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Nos. 05-7058 and 05-7142

Supreme Court, U.S.
FILED
SEP 18 2006
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LORENZO L. JONES,
Petitioner,
v.
BARBARA BOCK, ET AL.,
Respondents.

TIMOTHY WILLIAMS,
Petitioner,
v.
WILLIAM S. OVERTON, ET AL.,
Respondents.

JOHN H. WALTON,
Petitioner,
v.
BARBARA BOUCHARD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act (PLRA) requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them.

2. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

3. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense.

LIST OF PARTIES TO THE PROCEEDINGS

Jones v Bock (05-7058):

1. Plaintiff-Petitioner Lorenzo Jones.
2. Defendants-Respondents:

    a. Barbara Bock, Warden of the Saginaw Correctional Facility
    b. Valerie A. Chaplin, Assistant Deputy Warden
    c. Defendant-Respondent Paul Morrison, Classification Director
    d. Michael Opanasenko, Corrections Officer

3. Janet Konkle, R.N. and Ahmad Aldabagh, M.D. were included in the complaint initially as John Doe and Jane Doe. Petitioner later provided the names of Konkle and Aldabagh in response to a Court order requiring their names. Konkle and Aldabagh were never served with process.

***Williams v Overton* (05-7142):**

1. Plaintiff-Petitioner Timothy Williams.
2. Defendants-Respondents:

    a. William Overton, former Director of the Michigan Department of Corrections
    b. David Jamrog, Warden of the Gus Harrison Correctional Facility (ARF)
    c. Mary Jo Pass, Assistant Deputy Warden at ARF
    d. Paul Klee, Assistant Deputy Warden at ARF
    e. Chad Markwell, Corrections Officer at ARF
    f. Bonnie Peterson, Health Unit Manager at ARF

3. Petitioner named Dr. George Pramstaller, the Chief Medical Officer for the MDOC, as a Defendant but never served him.

Walton v Bouchard (05-7142):

1. Plaintiff-Petitioner John Walton.
2. Defendants-Respondents:
    a. Barbara Bouchard, former Warden of the Alger Maximum Correctional Facility (LMF)
    b. Ken Gearin, Assistant Deputy Warden at LMF
    c. David Bergh, Assistant Deputy Warden at LMF
    d. Catherine Bauman, Resident Unit Manager at LMF
    e. Denise Gerth, Assistant Resident Unit Supervisor at LMF
    f. Ron Bobo, Assistant Deputy Warden at LMF

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STATEMENT OF THE CASE

Michigan Department of Corrections (MDOC) Grievance and Appeal Process

Michigan's grievance process allows prisoners a "[M]ethod of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement." MDOC Policy Directive (PD) 03.02.130 ¶ I (effective November 1, 2000). (JA I, p 138). Except when otherwise noted, references are to the version of PD 03.02.130 in effect from November 1, 2000 to April 28, 2003. The events giving rise to the complaints in this case occurred under this version of the policy directive. The MDOC subsequently revised its policy. The current version of PD 03.02.130 (effective December 19, 2003) will be referenced in section II C of Respondents' brief. (Respondents' Appendix, *infra*, p 1b).

The grievance process involves three steps. The total exhaustion process must be completed within 90 days. (PD 03.02.130 ¶ V.). An inmate must first attempt to resolve the grievance within two business days verbally with the staff member involved "[U]nless prevented by circumstances beyond his/her control." (¶ T).

If the prisoner cannot resolve the grievance verbally, he may proceed to step I of the grievance system. Within five business days after attempting to verbally resolve the issue, the prisoner may submit a completed form to the grievance coordinator. (¶ Y). The grievance coordinator shall return a response to the prisoner within 15 days unless an extension has been granted. (¶ CC).

If the prisoner is dissatisfied with the step I response, the prisoner can submit a step II grievance. The step II grievance is due to the step II grievance coordinator within five business days after the prisoner receives his step I response. (¶ DD). The step II grievance shall be responded to and

returned within 15 business days unless an extension is granted. (¶ FF).

If the prisoner is dissatisfied with the step II response, the prisoner may file a step III grievance with the Director or the Director's designee within 10 days after receiving the step II response. (¶ GG). The step III response is the final step in the process.

The policy also permits prisoners to file grievances alleging racial or ethnic discrimination and staff brutality or corruption directly to step III along with grievances regarding the prisoner's removal as a housing unit representative.

Williams v Overton (05-7142)

Petitioner Timothy Williams,[1] a Michigan prison inmate, is currently serving a sentence of fifteen to twenty-five years for armed robbery and assault with intent to rob armed. He is also serving an additional mandatory two-year consecutive sentence for using a firearm in the commission of a felony.

Williams suffers from a medical condition in his right arm known as "noninvoluting cavernous hemangiomas" which causes tumors to grow and results in disfigurement. On March 3, 2002, Dr. Raymond Noellert, a contract physician with Correctional Medical Services, recommended that Williams have surgery to remove the tumors and to straighten his wrist.

Pramstaller and Dr. Rocco DeMasi of Correctional Medical Services denied Dr. Noellert's recommendation on March 26, 2002, because the danger of the surgery outweighed the benefits. They believed that the surgery was purely cosmetic. On March 26, 2002, Williams appealed the denial.

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[1] Timothy Williams, Prisoner No. 173396. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

Williams pursued his request for surgery using two different channels. First, Dr. J. Hoffman asked for another referral that Dr. Pramstaller and Dr. DeMasi denied. Second, he appealed the denial through the administrative grievance process. Pramstaller and DeMasi denied Dr. Hoffman's request on April 8, 2002.

Williams filed a step I administrative grievance regarding the denial of the surgery on June 7, 2002. (JA II, p 9). The Medical Services Advisory Committee subsequently denied his request for surgery a second time on July 25, 2002.[2] Williams then appealed that decision in steps II and III of the grievance process. Michigan Department of Corrections officials denied his grievance at both steps II and III. (JA II, pp 14-15). Williams did not name any of the Respondents at any step of the grievance process.

Williams requested placement in a handicapped-accessible single cell on August 13, 2002. On August 20, 2002, Williams filed a grievance against Respondent Jamrog in which he requested a single-cell accommodation. (JA II, p 20). Tom Bell, the Deputy Warden, denied his grievance on September 12, 2002. Williams ultimately appealed the denial of his request through steps II and III. Prison officials denied his requests at the next two steps. Neither of these grievances referred to any of the Respondents.

Williams did get placed in a handicapped-accessible cell on September 9, 2002. Respondent Pass also authorized another prisoner to assist him in certain tasks on September 9, 2002. But prison officials removed him from the handicapped-accessible cell and denied him the use of a prisoner-assistant on September 10, 2002, because he failed to provide any medical documentation that he qualified for a single cell or that he

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[2] The Medical Services Advisory Committee is composed of physicians from the Michigan Department of Corrections and Correctional Medical Services, a private health maintenance organization.

needed an assistant. Williams then filed step I grievances naming Respondents Klee, Markwell, Pass, and Peterson. Williams alleged in his grievances that Markwell and Klee conspired together to remove him from his handicapped-accessible cell. He claimed that Pass and Peterson did not accommodate his disability as required by the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) by returning him to a handicapped-accessible cell after September 10, 2002.[3] Prison officials denied his grievances at all three levels as to Klee, Markwell, Pass, and Peterson.

Williams filed suit in the United States District Court for the Eastern District of Michigan alleging that Respondents Jamrog, Klee, Markwell, Pass, Peterson and Overton violated his constitutional and statutory rights under the Eighth and Fourteenth Amendments and the ADA and the RA by denying him authorization for surgery and denying him placement in a handicapped-accessible cell. At the time he filed his federal court complaint Williams was housed at the Gus Harrison Correctional Facility (ARF) in Adrian, Michigan. Petitioner Williams had not exhausted all of his administrative remedies against all of the Respondents as is required by the Prison Litigation Reform Act (PLRA).[4]

The Respondents filed a dispositive motion arguing that Williams failed to exhaust his administrative remedies. The Magistrate Judge concluded in the Report and Recommendation (R&R) that Williams failed to name any of the Respondents in his claim regarding the denial of his medical procedure during the administrative appeals process and therefore he failed to exhaust his administrative remedies. (JA I, p 76). Since he failed to name all of the Respondents in the administrative process, he had only partially exhausted his administrative remedies. Accordingly, the Magistrate Judge concluded the entire matter should be dismissed without

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[3] 29 USC § 701, *et seq.*; 42 USC § 12101, *et seq.*

[4] 42 USC § 1997e(a).

prejudice. The Magistrate Judge also recommended dismissing the case on the merits.

The District Court adopted the portion of the R&R that dismissed the action based on Williams's failure to exhaust his administrative remedies pursuant to the PLRA. (JA I, p 106). The District Court did not address the portion of the R&R that dealt with the issues on the merits. Williams filed a timely appeal on November 14, 2003.

The Court of Appeals affirmed the District Court based on Williams's failure to name the individuals he intended to sue in his grievance regarding his request for surgery in the administrative appeals process.[5] (JA I, p 110). The Court of Appeals concluded that his failure to name all of the Respondents constituted partial exhaustion of his administrative remedies. Previously, in *Jones Bey v Johnson*, the Court of Appeals had held that if a prisoner had only partially exhausted his claim, then the entire complaint had to be dismissed without prejudice.[6]

Walton v Bouchard (05-7142)

Petitioner John Walton,[7] a Michigan prison inmate, is currently serving a sentence of four to twenty years for delivery of narcotics. He is also serving a mandatory consecutive two-year sentence for possessing a gun during the commission of a felony.

On July 17, 2001, Respondent Gearin put Walton on an indefinite "upper slot restriction" for assaulting a corrections officer. The upper slot restriction required that he could only receive food and paperwork through a lower food slot of his

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[5] *Williams v Overton, et al*, unpublished per curiam opinion, No. 03-2507, 2005 US App Lexis 12277 (CA 6 June 22, 2005).

[6] *Jones Bey v Johnson*, 407 F3d 801, 805 (CA 6 2005).

[7] John Walton, Prisoner No. 173849. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

cell door. Walton subsequently filed a grievance on April 16, 2002, against Respondent Bobo. Walton alleged in his grievance that white prisoners received, at most, a 60-day suspension for similar conduct. His grievance was only directed at Respondent Bobo. Respondent Gerth responded to the grievance by indicating that ADW Gearin had placed him on the upper slot restriction. Gerth's response dated April 26, 2002, explained that prison discipline is imposed on an individual basis.

Walton appealed his grievance through steps II and III. Bobo is the only person Petitioner Walton named in his step II and III grievances. Prison officials denied his grievances at both steps.

Walton, an African-American prison inmate, brought suit in the United States District Court for the Western District of Michigan against Respondents Bouchard, Gearin, Bergh, Bauman, Bobo, and Gerth pursuant to 42 USC § 1983 alleging racial discrimination under the Fourteenth Amendment. Petitioner Walton did not exhaust his grievances against anyone other than Bobo prior to filing suit.

The Magistrate Judge issued an R&R recommending dismissal based on Petitioner Walton's failure to exhaust his administrative remedies. (JA I, p 158). The Magistrate Judge found that Walton had not exhausted his administrative remedies against Bouchard, Gearin, Bergh, Bauman, or Gerth.

The adopted the R&R and applied the total exhaustion rule, prior to the Court of Appeals' decision in *Jones Bey*, and dismissed the case without prejudice. (JA I, p 165). The total exhaustion rule requires prisoners, during the administrative process, to exhaust all of their claims against all of the parties they intend to sue.[8] Failure to do so requires the District Court to dismiss the action in its entirety without prejudice. The

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[8] *Jones Bey*, 407 F3d at 809.

District Court found Walton had not named each of the Respondents in his grievances. Consequently, he had only partially exhausted his administrative remedies. Walton filed a timely Notice of Appeal on October 29, 2003.

The Court of Appeals affirmed, citing its decisions in *Curry v Scott* and *Jones Bey*.[9] (JA I, p 168).[10] In its decision, the Court of Appeals ruled that Walton had only named Bobo in his grievances. Thus, he had only partially exhausted his administrative remedies.

Jones v Bock (05-7058):

Lorenzo Jones,[11] a Michigan prison inmate, is currently serving concurrent sentences of fifteen to thirty years for armed robbery and first degree criminal sexual conduct. He is also serving an additional mandatory two-year consecutive sentence for using a firearm in the commission of a felony.

Inmate Lorenzo Jones is an inmate under the jurisdiction of the Michigan Department of Corrections. He was incarcerated at the Saginaw Correctional Facility at the time at issue.

On September 15, 2001, Jones filed a step I grievance against Opanasenko, Health Care, Classification Director, Deputy Warden, and the Warden stating that he could not do certain of his work assignment duties, which Opanasenko required him to do. (JA II, p 2). Jones stated he was wearing a neck brace and walking with a cane, due to an automobile accident in November 2000. Jones claimed Opanasenko, Classification Director, Deputy Warden, Health Care and the Warden were all aware of his current conditions. Jones's work

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[9] *Curry v Scott*, 249 F3d 493, 503 (CA 6 2001); *Jones Bey*, 407 F3d at 805.

[10] *Walton v Bouchard, et al*, unpublished per curiam opinion, No. 03-2458, 2005 US App Lexis 11991 (CA 6 June 17, 2005).

[11] Lorenzo Jones, Prisoner No. 176204. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

evaluation form contained a statement indicating Jones wrote: "I would like to be removed from this detail." Jones asserted he did not write that comment. The grievance further indicates Jones was walking with a cane and wearing a neck brace at the time of the incident.

Jones's step I grievance further indicates Opanasenko, Health Care, Classification, Deputy Warden, and Warden knew or should have known that by requiring Jones to work beyond his physical capabilities, they were violating the First, Eighth, and Fourteenth Amendments to the Constitution. He also indicated that qualified immunity should not shield the defendants because his rights were clearly established and should have been known to a reasonable person. Jones's step I grievance indicated he would suffer harm if the negative work evaluation remained in his file, when he went before the parole board. The grievance also indicates he was cleared by Health Care for such a job. The grievance claims that Opanasenko threatened to write a misconduct ticket against Jones when Jones refused to pick up some equipment, but that Opanasenko did not do so. Jones claimed Opanasenko did not like him and "harassed" him by insisting that he pick up equipment and hand it to other inmates. Jones asks for five specific remedies, one of which is that he not be required to work until cleared by "personal outside doctor's" [sic]. Jones's only mention of "retaliation" was in his request for relief where he asked that none of the "above named defendants" their agents or co-workers should take "retaliatory actions" against him.

Notable for their absence from the step I grievance are (1) any claim that Jones suffered any injury or aggravation of any condition or injury as a result of carrying out his duties (2) any mention that he was wearing a leg or foot brace at the time of the incident; (3) any claim that he had not been medically cleared for the work assignment.

The step I grievance response indicates the negative work evaluation Jones complains of is appropriate and denies him any relief. (JA II, p 3).

Jones filed a step II grievance appeal arguing that the step I response did not address his claims against anyone but Opanasenko. (JA II, p 4).

Warden Bock's step II response notes that "Health care verified that his medical condition does not preclude him from handing out recreation equipment," and that Health Care confirmed that Jones "was physically capable of working this assignment." (JA II, p 5). Warden Bock's response also indicates that Classification assigned Jones to the equipment handler work assignment because it was a "light duty" assignment appropriate for his medical condition. Warden Bock's response notes that the work evaluation was defective in that it was signed twice by the reporting officer, but not by his supervisor. The evaluation would be removed from Jones's file, but the officer may re-write it and have his supervisor sign it. Warden Bock's response further reminded staff that the evaluation forms must be signed by a supervisor before processing them through Classification.

Jones filed a step III appeal, claiming health care at that particular prison, "SRF" (the initials that are shorthand for Saginaw Correctional Facility) had not examined him to make a detail of his injuries. (JA II, pp 6-7). He also indicated prison officials denied him his First, Eighth, and Fourteenth Amendment rights to be "free of activities that Plaintiff **may or may not** be physically capable of performing." (JA II, p 7, emphasis added). Jones complains his issues have not all been addressed.

On December 11, 2001, the step III response indicates the responses at steps I and II adequately address the merits of the main issue grieved and denied, confirmed the work evaluation had been re-written and inserted in his file while the

defective work evaluation had been removed. (JA II, p 8). The response indicated the grievance had been resolved.

On November 15, 2002, Jones filed his complaint in the United States District Court for the Eastern District of Michigan, suing the State of Michigan; the Michigan Department of Corrections; Warden Bock; Deputy Warden of Programs, Chaplin; Classification Director Morrison; Correctional Officer Opanasenko; and Health Care Jane Doe and John Doe. (JA I, p 7). Jones claims he suffered injuries in an automobile accident in November 2000, which required surgery. In July 2001, Jones claims Classification Director Paul Morrison assigned him to a work assignment handing out exercise equipment. Jones claims Morrison knew of his condition and knew Jones was unable to perform the work assignment. Jones alleged that Officer Opanasenko told him he was faking his condition and to do his assignment or he would be written a misconduct ticket.

Jones's complaint claims he did perform his duties and, for the first time, Jones claims he re-injured and aggravated injuries to his back, shoulders and neck. Jones claims he was wearing a neck brace, leg brace, walking with a cane, and on pain medication when this incident occurred. Jones claims each defendant failed to comply with their duty to keep Jones from being placed in a position that exposed him to serious risk of serious injuries, and knew or should have known that Jones was physically unable to perform the work assignment. Jones also alleges Opanasenko harassed him by threatening to write a misconduct ticket for Jones's staring at him in a threatening manner. Jones claims he was walking "with a cane and had a foot and neck brace on and suffered paralysis on the left side of [his] body. Jones also alleged Opanasenko retaliated against him by writing an evaluation form indicating Jones was a poor worker and when Jones told Opanasenko he could not perform his duties, he "appeared to be threaten." Jones alleged violations of his First, Eighth and Fourteenth Amendment rights under the United States Constitution. Jones also alleged

torts of infliction of emotional distress and physical pain and suffering.

In his complaint, Jones alleges at paragraph 3 that he exhausted all available administrative remedies. He provides the precise dates that he filed a grievance at each step of the three-step process. But he does not explain how the grievance was resolved, what issues were raised in the grievance, who he filed the grievance against, or why he did not attach copies of the grievance documents.

On November 19, 2002, the District Court issued an initial order, dismissing the State of Michigan and Michigan Department of Corrections and ordering service on the rest of the Defendants. The order also informed Jones that he had 60 days to identify the John Doe and Jane Doe. This order did not mention exhaustion of administrative remedies.

On January 10, 2003, within ten days of the appearance by Opanasenko, Bock, Chaplin and Morrison, and before discovery, Jones filed a motion (JA I, p 1, docket entry 11) to name Jane Doe as Janet Konkle, RN and John Doe as Ahmad Aldabagh, M.D. On January 17, 2003, the court granted that motion. (JA I, p 1, docket entry 13). The record does not reflect service of process on Konkle or Aldabagh.

As the Magistrate Judge related, Defendants responded to the complaint with a motion to dismiss based on Jones's failure to exhaust administrative remedies. (JA I, p 18, 29 n. 4). Attaching Jones's pertinent grievance and the responses at all three steps, Defendants argued that Jones had not exhausted all administrative remedies with respect to the allegations of his complaint. They argued total exhaustion required the court to dismiss the entire complaint.

In his Report and Recommendation, the Magistrate Judge advised the court to dismiss the claims against Bock, Chaplin, Konkle and Aldabaugh. He further opined that total

exhaustion was not required. While law in the Sixth Circuit held a plaintiff could not amend the complaint to show exhaustion, where the defendant submitted the pertinent grievance forms, that issue did not come into play. Here, by the time the Magistrate Judge reviewed the case, the grievance forms were available to him and he could use them to decide whether the plaintiff had exhausted administrative remedies. The Magistrate Judge rejected the Defendants' argument that the grievance exhausted only Jones's claims against Opanasenko for a negative work evaluation. He held that Jones had sufficiently exhausted his claims against both Opanasenko the Classification Director Morrison.

On September 25, 2003, the District Court adopted the recommendation to dismiss Bock, Chaplin, Konkle and Aldabaugh, but rejected the recommendation with respect to Opanasenko and Morrison. (JA I, p 40). The District Court recognized that the PLRA establishes a unique procedure under which the court is required to evaluate whether there is a claim upon which relief can be granted set forth in the complaint. In order to effective screen cases, the court acknowledged, the initial complaint must stand or fall on its own. Based on the failure to state a claim upon which relief can be granted, the court dismissed the complaint. The judge noted that she did not need to reach and did not decide the Defendants' total exhaustion argument.

Jones appealed on November 26, 2003. (JA I, p 4, docket entry 42). In response, on April 12, 2004, the Michigan Attorney General's Office filed a letter with the Court of Appeals informing the Court that due to limited resources during the fiscal crisis, as well as the increasing workload, the Attorney General's Office lacked sufficient resources to file briefs in cases such as this one. (JA I, p 5, docket entry 4/14/04). The Appellees would rely on the record below.

On April 27, 2005, the Court of Appeals issued its decision in *Jones Bey v Johnson,* joining the Eighth and Tenth Circuits in recognizing the total exhaustion rule.[12]

On June 15, 2005, the Court of Appeals issued its *per curium* decision in the instant case affirming the District Court. (JA I, p 44). The Court of Appeals recognized that the PLRA requires inmate to exhaust all administrative remedies before bringing an action in federal court. The Court relied on *Jones Bey*, holding that pursuant to the total exhaustion requirement, where a single claim remains unexhausted, the entire complaint must be dismissed. The Court also held that to meet the PLRA's exhaustion requirement, the inmate is required to either attach a copy of his prison grievance forms to the complaint, or state the nature of the remedies pursued and the outcome of each process. While Jones alleged conclusorily that he exhausted administrative remedies, he did not attach his grievance and responses or explain the remedies he pursued and the results. The Prison Officials' provision of documentation that Jones may have exhausted some claims was deemed irrelevant, because Jones did not show he exhausted all of his claims.

Jones filed a petition for writ of certiorari on October 13, 2005, which this Court granted on March 6, 2006.

As of June 6, 2006 when *Spencer v Bouchard* issued, panels of the Court of Appeals for the Sixth Circuit are in a dispute as to whether total exhaustion or partial exhaustion is recognized in the Sixth Circuit.[13] This Court's decision will settle the issue, as to which there is conflict among the Circuits and within the Sixth Circuit.

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[12] *Jones Bey v Johnson*, 407 F3d 801 (CA 6 2005).
[13] *Spencer v Bouchard*, 449 F3d 721 (CA 6 2006).

SUMMARY OF THE ARGUMENT

The PLRA ūshered in new regime for federal litigation brought by prisoners. Requiring total exhaustion, heightened pleadings and identifying parties in prisoner grievances all comport with the purposes of the PLRA to decrease the number and increase the quality of prisoner lawsuits. Congress enacted the PLRA due to the outsized consumption of judicial resources prisoner lawsuits garner, resulting in fewer judicial resources devoted to all meritorious litigation. These PLRA requirements also serve comity, allowing the States the first opportunity to address inmate's concerns. This recognizes the unique expertise of prison officials in dealing with prisoner's issues. These PLRA provisions result in creation of an administrative record that is useful to the court if litigation results. And they diminish piecemeal litigation and otherwise serve judicial economy.

No fewer than three sections of the statute require judicial screening. The PLRA also includes the proviso that the court may require a defendant to respond to the complaint only if the court finds that the plaintiff has a reasonable opportunity to prevail on the merits. This is a more demanding standard than even the requirement to state a claim upon which relief can be granted. For this requirement to have meaning, heightened pleadings that demonstrate exhaustion as to all defendants are mandatory. Without the inmate pleading and showing that exhaustion of administrative remedies is complete as to all defendants, the court cannot make the determination that the inmate has a reasonable opportunity to prevail on the merits.

The Court of Appeals correctly held that prisoners must name or identify particular defendants in their grievances in order to exhaust administrative remedies as to those defendants and preserve the right to sue them. This requirement is consistent with the plain language of the statute because it

creates the administrative record necessary to determine whether the inmate exhausted all administrative remedies.

Moreover, this Court held the PLRA requires prisoners to properly exhaust claims. Proper exhaustion requires prisoners to comply with the administrative requirements. The Michigan Department of Corrections grievance policy requires inmates to be specific in their grievances. Naming, or at least identifying, the corrections officials is an element of that specificity. Current MDOC policy does explicitly require prisoners to name in their grievances those they intend to sue. *Woodford v Ngo* therefore requires proper exhaustion: identifying the alleged wrongdoers and exhausting administrative remedies as to them before filing a suit in federal court.[14]

The PLRA embodies a total exhaustion requirement. Section 1997e(a)'s provision that "no action shall be brought" by a prisoner, prior to exhaustion of administrative remedies, requires the inmate to exhaust all remedies or suffer dismissal of the entire action. As this Court recently held in *Woodford v Ngo,* " . . . saying that a party may not sue in federal court *until* the party first *pursues* **all** available avenues of administrative review necessarily means that if the party never pursues **all** available avenues of administrative review, the party will never be able to sue in federal court."[15] If a remedy remains unexhausted as to even a single claim or defendant, then the plaintiff did not exhaust all available remedies, and the PLRA requires dismissal.

Other portions of the PLRA are consistent with this result. Section 1997e(c)(1) requires the court to dismiss entire actions if the action is meritless. Section 1997e(c)(2) permits the court, if it chooses, to dismiss meritless claims, regardless

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[14] *Woodford v Ngo*, 548 US __; 165 L Ed 2d 368; 126 SCt 2378, 2388 (2006).

[15] *Woodford*, 126 SCt at 2391 (italics in original; bold emphasis added).

of exhaustion. These provisions give the court the option to dismiss entire actions that cannot succeed and should not be brought again, regardless of exhaustion. The three provisions also give the court the options of dismissing the entire action if any claim remains unexhausted, or, if judicial economy is better served, to dismiss with prejudice particular meritless claims without being required to determine whether the inmate completed exhaustion as to them.

Finally, in several ways the habeas corpus statute informs the PLRA total exhaustion requirement. This Court recognized the habeas corpus provision requiring total exhaustion in 1982 in *Rose v Lundy*.[16] This decision was well-known to Congress when it drafted the PLRA in 1995. The PLRA scenario is, in some respects, parallel to the habeas corpus statute, which also requires heightened pleadings and judicial screening. Habeas corpus law requires inmates to exhaust state remedies prior to filing a petition, while the PLRA mandates that inmates exhaust before filing an action. Under the PLRA's new regime, as under habeas corpus law, notice pleading gives way to the more specific statutes that govern these unique areas of prisoner civil litigation. Some general provisions of traditional notice pleading rules that conflict with the new more specific PLRA regime, must yield.

[16] *Rose v Lundy*, 455 US 509 (1982).

ARGUMENT

I. The PLRA instituted a "new regime" for inmates challenging prison conditions, requiring exhaustion of administrative remedies and imposing the requirements to plead and demonstrate exhaustion as to all defendants.

The Prison Litigation Reform Act (PLRA) changed the procedures for processing litigation brought by prisoners with respect to prison conditions. As this Court held, the PLRA instituted a "new regime."[17] The Court of Appeals in the cases at hand correctly applied the PLRA and dismissed the complaints without prejudice.

A. The plain text of the PLRA establishes a new regime that imposes a heightened pleading standard.

The PLRA's judicial screening requirements, in combination with the mandate to exhaust administrative remedies prior to bringing suit,[18] imposes a heightened pleading standard on prisoner litigators, requiring them to demonstrate exhaustion as to all defendants.

The PLRA's heightened pleading requirement rests on no fewer than three judicial screening provisions: 28 USC § 1915(e)(2), 28 USC § 1915A, and 42 USC § 1997e(c).

First, 28 USC § 1915(e)(2) requires dismissing the case at any time under the circumstances enumerated:

> (2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the

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[17] *Porter v Nussle*, 534 US 516, 525 (US 2002).
[18] 42 USC § 1997e(a).

court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or
(B) the action or appeal--

(i) is frivolous or malicious;
(ii) fails to state a claim on which relief may be granted; or
(iii) seeks monetary relief against a defendant who is immune from such relief.

Second, 28 USC § 1915A requires the court to screen the case even before docketing, if feasible:

§ 1915A. Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.

Third, 42 USC § 1997e(c) requires the court to dismiss the action and allows it to dismiss individual claims for the specified reasons:

> (c) Dismissal.
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

And the waiver of answer provision is a fourth direction to the courts to screen early and often.[19]

These PLRA screening requirements are an "invigorated"[20] version of a prior law. The prior law, 42 USC § 1997e(a)(1) contained a weak exhaustion provision that gave district courts discretionary authority to stay actions for a limited time pending exhaustion.[21] Also, under the earlier

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[19] 42 USC § 1997(g).

[20] See *Porter v Nussle*, 534 US 516, 524 (2002)(recognizing the PLRA provides an "invigorated" exhaustion prescription).

[21] *Woodford*, 126 SCt at 2382.

statute, provision 28 USC § 1915(d), permitted courts to dismiss a claim filed *in forma pauperis* "if . . . satisfied that the action is frivolous or malicious." As construed in *Neitzke v Williams*[22] and *Denton v Hernandez*,[23] the courts had discretion to conduct *sua sponte* screening under 28 USC § 1915(d). Further, the statute allowed dismissal only if the court ruled the action malicious or frivolous. The courts had no discretion to dismiss for failure to state a claim.

The PLRA strengthened *sua sponte* screening in several ways. First, judicial screening is now mandatory.[24] Second, actions must be dismissed not only if frivolous, but also if malicious, if they fail to state a claim upon which relief can be granted, or if they seek money damages from someone with immunity.[25] The PLRA emphasized the mandatory nature of judicial screening by addressing a unique provision in 42 USC § 1997e(g) permitting any defendant to "waive the right to reply to any action." This section prohibits the court from granting any relief "unless a reply has been filed," but a court may not require a reply unless "it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

The PLRA provisions build on *Neitzke's* interpretation of the prior law that, *Neitzke* said, gave district courts "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless."[26] *Neitzke* carefully noted the function of this type of provision. "Section 1915(d) is designed largely to

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[22] *Neitzke v Williams*, 490 US 319, 324 (1989)(recognizing dismissals for frivolousness under 28 USC § 1915(d) were "often made" sua sponte to spare defendants expense and inconvenience).

[23] *Denton v Hernandez*, 504 US 25 (1992)("The [in forma pauperis] statute protects against abuses of this privilege by **allowing** a district court to dismiss the case 'if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.' § 1915(d).").

[24] 42 USC § 1997e(a); 28 USC § 1915(e)(2); 28 USC § 1915A; and 42 USC § 1997e(g)(2).

[25] 42 USC § 1997e(c)(1).

[26] *Neitzke*, 490 US at 327.

discourage the filing of, and waste of judicial resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits."[27]

The statute allows defendants to waive an answer and prevents the court from authorizing service of process on a defendant unless the court first certifies that the inmate has a reasonable opportunity to prevail on the merits.[28] Looking at the statute as a whole and in light of Congress's intent in enacting the statute demonstrates that exhaustion of administrative remedies is a pleading requirement and not an affirmative defense.

The first step in the task of interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning."[29] But courts cannot determine whether a statute has a plain and unambiguous meaning by looking at the language in isolation. Instead, the court must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[30] As this Court stated "'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy.'"[31]

As the Court of Appeals noted in *Baxter v Rose,* the PLRA sets up a unique screening process that puts the burden on the courts to determine whether the complaint states a claim upon which relief can be granted, even before the complaint can be served on a defendant.[32] Section 1915A provides that district courts shall ". . . before docketing, if feasible or, in any event, as soon as is practicable after docketing," screen

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[27] *Neitzke*, 490 US at 327.
[28] 42 USC § 1997e(g).
[29] *Robinson v Shell Oil Co,* 519 US 337, 340 (1997).
[30] *Robinson*, 519 US at 341.
[31] *Philbrook v Glodgett,* 421 US 707, 713 (1975)(citations omitted).
[32] *Baxter v Rose*, 305 F3d 486, 490 (CA 6 2002).

prisoner complaints against governmental officials or entities to determine, among other things, whether they state claims on which relief may be granted.[33] The courts would be prevented from efficaciously screening cases if the plaintiffs could, through obscure pleading, circumvent the PLRA requirement to show a reasonable opportunity to prevail on the merits or face dismissal without prejudice prior to service of process.[34]

The *Baxter* decision relied on by the Court of Appeals here is supported by opinions of this Court. In *Porter v Nussle*, this Court ruled that exhaustion of administrative remedies is required for all prisoner litigation, stating: ". . . exhaustion is a prerequisite to suit."[35] Further, this Court opined that Congress intended the PLRA to upgrade the caliber of prisoner litigation: "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and **improve the quality** of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."[36] And this Court recognized that "the PLRA establishes a different regime."[37] This Court further held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[38]

B. The flood of inmate litigation in federal courts prompted Congress to enact the PLRA.

For most of the history of the Republic prisoners had few if any constitutional rights cognizable in the courts. The "hands-off" doctrine prevailed well in to the middle part of the twentieth century.[39] Under the hands-off doctrine federal courts would rarely, if ever, review prisoner civil rights

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[33] 28 USC § 1915A.
[34] 42 USC § 1997e(g).
[35] *Porter*, 534 US at 524.
[36] *Porter*, 534 US at 524-25 (emphasis added).
[37] *Porter*, 534 US at 525.
[38] *Porter*, 534 US at 528.
[39] Mushlin, *Rights of Prisoners, Third Edition (2002), Vol 1*, p 14.

complaints on the merits. This Court only explicitly recognized that prisoner cases should be addressed on the merits in 1974.[40] Congress enacted 28 § USC 1915(d) the precursor to the PLRA in an attempt to deal with the heavy burden that prison litigation imposed on the courts.

In 1989 in *Neitzke v Williams,* a unanimous Court characterized the role of 28 USC § 1915(d)[41]:

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11.

This Court also described how the flood of baseless lawsuits hindered the courts in addressing even meritorious claims[42]:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints.

In *Neitzke*, this Court held that since 1915(d) allowed dismissal of frivolous claims the Court of Appeals erred in sua sponte dismissing the claim for failure to state a claim upon which relief could be granted. Frivolous and failure to state a claim were not synonymous this Court decided. While this Court in

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[40] *Wolf v McDonnell*, 418 US 539, 555-56 (1974); *Procunier v Martinez*, 416 US 396, 405-06 (1974).
[41] *Neitzke*, 490 US at 327.
[42] *Neitzke*, 490 US at 327.

Neitzke felt constrained to reject these policy considerations because its role was "not to make policy, but to interpret a statute," [43] no such constraint is appropriate here because the PLRA was enacted in response to these policy considerations, and requires total exhaustion, judicial screening, and heightened pleadings. Since the PLRA specifically requires dismissal for failure to state a claim, Congress implemented *Neitzke's* policy concerns by statutory amendment.

C. The PLRA's legislative history supports total exhaustion and heightened pleadings.

Against the backdrop of the weak 28 USC § 1915(d) described in *Neitzke*, Congress, a few years later, crafted the current PLRA. Total exhaustion and heightened pleadings are stringent but necessary because they will reduce the "outsized share" of civil filings brought by prisoners.[44] The PLRA is intended to deal with a perceived "disruptive tide of frivolous prisoner litigation."[45] The policy concerns articulated in *Neitzke* were voiced during Congressional debates. "The crushing burden of these frivolous suits make it difficult for the courts to consider meritorious claims," Senator Hatch explained in one speech.[46] Senator Kyl explained the need for the statutory reform of mandatory exhaustion of administrative remedies by referring to a comment by Chief Justice Rehnquist in his dissent in *Cleavinger v Saxner*: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."[47] And as

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[43] *Neitzke*, 490 US at 326.
[44] *Woodford*, 126 SCt at 2388.
[45] *Woodford*, 126 SCt at 2389.
[46] 141 Cong Rec S 14627 (daily ed Sept 29, 1995)(Statement of Senator Hatch).
[47] 141 Cong Rec S 7527 (daily ed May 25, 1995)(Statement of Senator Kyl); *Cleavinger v Saxner*, 474 US 193, 211 (1985)(Rehnquist, J. dissenting)(emphasis added).

Senator Kyl asserted: "If we achieve a 50% reduction in bogus federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."[48] Professor Schlanger's exhaustive examination of prisoner filings supports this idea[49]:

> Inmates do indeed file a large number of cases compared to other litigants, and in 1996 those numbers had been increasing sharply. Those cases did indeed mostly fail. The system probably cost more to administer than the total amount of compensation it provided victims of tortious injury.

More specifically, Professor Schlanger notes the "extremely high" rate of prisoner filings in federal courts, in comparison to persons not incarcerated[50]:

> In 1995, for example, inmates filed federal civil rights cases at the rate of about 25 per 1000 inmates; non-inmates, in contrast, filed civil suits in federal court at a rate of about 0.7 per 1000 non-inmates. So, nationally, inmates filed about 35 times as frequently as non-inmates.

And, as this Court recognized, the flood continues[51]:

> [P]risoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or on

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[48] 141 Cong Rec S 19114 (daily ed Dec 21, 1995)(Statement of Senator Kyl).

[49] Schlanger, *Inmate Litigation*, 116 Harvard Law Review 1555, 1692 (2003).

[50] Schlanger, *Inmate Litigation*, 116 Harvard Law Review 1555 at 1575.

[51] *Woodford*, 126 SCt at 2386 n 2, 2388.

> average about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country.

As noted by the Eleventh Circuit, in *Alexander v Hawk*, Congress amended section 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts.[52] "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'"[53]

The costs to courts for handling prisoner litigation are substantial. Based on the estimate of the Federal Judicial Center, inmate cases filed in 1995 cost about 51 million dollars.[54] State costs are not insignificant either. During the PLRA debates, the National Association of Attorneys General estimated that the States' costs in 1995 were about 80 million dollars each year on inmate litigation.[55] These problems and issues prompted Congress to enact the PLRA.

D. Total exhaustion and heightened pleadings are consistent with the policies underpinning the PLRA.

The total exhaustion rule is consistent with the overall policies of the PLRA. As this Court recognized, "[I]t is beyond doubt that Congress enacted § 1997e(a) to reduce the quantity

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[52] *Alexander v Hawk*, 159 F3d 1321, 1326 n 11 (CA 11 1998)(citing 141 Cong Rec H 14078-02, *H 14105 (daily ed Dec 6, 1995)).

[53] *Alexander*, 159 F3d at 1326 n 11 (quoting 141 Cong Rec S 14408-01, *S14418 (daily ed Sept 27, 1995)).

[54] *See*, Schlanger, *Inmate Litigation*, 116 Harvard Law Review pp 1624-1625.

[55] *See*, Letter from NAAG to Senate Majority Leader Bob Dole, reprinted 141 Cong Rec S 14417 - S 14418 (daily ed Sept 27 1995); *See* Schlanger, *Inmate Litigation*, 116 Harvard Law Review at 1625.

and improve the quality of prisoner suits."[56] In *Woodford*, this Court emphasized again: "A centerpiece of the PLRA's effort 'to reduce the quantity . . . of prisoner suits' is an 'invigorated' exhaustion provision, § 1997e(a)."[57] The total exhaustion and heightened pleadings requirements satisfy the policy objectives of the Act in several ways.

1. Total exhaustion and heightened pleadings improve the quality and decrease the quantity of prisoner lawsuits.

Total exhaustion and heightened pleadings both improve the quality of the lawsuits, and decrease the quantity, since district courts can properly screen cases and do not have to sort through each allegation of each complaint to determine which claims are exhausted and which are unexhausted. A partial exhaustion interpretation would require courts to spend scarce judicial resources sorting through often voluminous records to determine which claims could proceed. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. As the Third Circuit stated in *Nyhuis v Reno*[58]:

> Inmate-plaintiffs often file claims which are untidy, repetitious, and redolent of legal language. The very nature of such complaints necessitates that courts expend significant and scarce judicial resources to review and refine the nature of the legal claims presented.

The PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete

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[56] *Porter*, 534 US at 524.
[57] *Woodford*, 126 SCt at 2378, 2382.
[58] *Nyhuis v Reno*, 204 F3d 65, 74 (CA 3 2000).

for all claims, before requiring any defendant to respond to the complaint. Again, the question is whether prisoner plaintiffs or courts should bear the burden of sorting through the complaint to include only exhausted claims. The PLRA, recognizing that inmates have

2. Total exhaustion and heightened pleadings decrease piecemeal litigation.

The total exhaustion and heightened pleadings rules diminish piecemeal litigation.[59] If a prisoner were allowed to proceed on some claims and not others, the prisoner could bring a second lawsuit requiring the District Court to once again expend scarce judicial resources reviewing whether each and every claim in the new action to determine which claims, if any, are unexhausted and which are meritless. This could result in a series of lawsuits dealing with the same set of operative facts pending at different stages of discovery, and different procedural postures. Potentially different outcomes could raise consideration of complicated questions of issue and claim preclusion. Total exhaustion and heightened pleadings, in contrast, promote judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

3. Total exhaustion and heightened pleadings support comity by giving State officials the first opportunity to address prisoner concerns.

As the Court of Appeals recognized in *Brown v Toombs,* a purpose of the PLRA is to promote comity: "The new statute has extensive benefits. It recognizes that it is

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[59] *Jones Bey*, 407 F3d at 808; *Ross v City of Bernalillo*, 365 F3d 1181, 1190 (CA 10 2004).

difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983."[60]

Total exhaustion recognizes that prison problems are best addressed first by the States. As the Court stated in *Preiser*[61]:

> Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.

The total exhaustion and heightened pleadings rules have collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[62] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints.[63] The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process, and to avoid litigation altogether. Similarly, the heightened pleadings rule forces inmates to get their claims in order and demonstrate exhaustion before filing a complaint

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[60] *Brown v Toombs*, 139 F3d 1102, 1103 (CA 6 1998).
[61] See *Preiser v Rodriguez*, 411 US 475, 491-92 (1973).
[62] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.
[63] *Jones Bey*, 407 F3d at 807.

in federal court. In these ways these rules improve the quality of lawsuits.

And these rules aid the federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims.[64] By requiring total exhaustion of all claims, the PLRA ensures that the inmate has pursued all avenues of relief available at the administrative level, for all claims against all defendants. This makes available to the court a complete administrative record. And heightened pleadings make feasible the necessary judicial screening prior to service.

E. Where court rules conflict with the later-enacted PLRA, the PLRA controls.

To the extent that the pre-screening and mandatory exhaustion requirements of the PLRA conflict with the general procedures embodied in Federal Rules of Civil Procedure 8, 9 and 15, the PLRA controls. An analysis of the PLRA and F R Civ P 8, 9, and 15 demonstrates that the Court of Appeals properly dismissed the instant cases without prejudice.

Congress delegated rule-making authority to this Court. But Congress may still enact and has in fact enacted, Rules of Practice and Procedure or Evidence directly.[65] And Congress can enact statutes that supersede pre-existing rules[66]:

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[64] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.

[65] *See* the direct Congressional changes to the Federal Rules of Evidence in 1994. Pub L No 103-322, Title XXXII, §§ 320935(a), 320935(e) and Title IV, § 40141(b), 103d Congress, September 13, 1994; *see also* Fed R Evid 412-415.

[66] *1 Moore's Federal Practice* § 1.06 (Matthew Bender 3d ed). See e.g., *Traverse Bay Area Intermediate School Dist v Hitco, Inc*, 762 F Supp 1298, 1301 (WD Mich 1991) and *United States v Sharon Steel Corp*, 681 F Supp 1492, 1495-96 (D Utah 1987), holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601, *et seq*, provision that defines "corporation" supersedes F R Civ P 17(b) for purposes of a CERCLA action against a dissolved corporation. But see e.g., *United States v Gustin-Bacon Div Certain-Teed Prod Corp*,

> Congress has plenary power to adopt a statute that supersedes an existing rule. If an inconsistent statute is enacted after the effective date of a rule, the statute takes precedence and is deemed to supersede or modify the conflicting rule, provided that the congressional intent is clear. If it is unclear, the courts will strive to construe the statute in harmony with the rule to the extent possible.

In *Crawford Fitt Co v JT Gibbons, Inc,*[67] this Court addressed a conflict between statutory provisions and a court rule. The petitioners who won a directed verdict filed a bill of costs seeking reimbursement from the respondent for expert witness fees petitioners had paid. The district court awarded them only $30.00 per day citing 28 USC § 1920 and 28 USC § 1821. Petitioners argued that Federal Rule of Civil Procedure 54(b) gave the court the discretion to award costs in excess of the statutory limits. This Court read the statute and the court rule in harmony, holding that the court rule gave the court discretion as to whether to award costs at all, but that the statute embodied the limits on the amounts the court could, in its discretion, award. In rejecting the petitioner's interpretation of the court rule that would have rendered the statute superfluous, this Court stated: "We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning."[68] Importantly, in analyzing how to reconcile the statutes with the court rule, the *Crawford Fitt Co.* decision relied on principles of statutory interpretation and held that the more specific

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426 F2d 539, 542 (CA 10 1970), *cert denied*, 400 US 832 (1970)(holding that the Civil Rights Act of 1964 did not supersede F R Civ P 8 on pleadings).

[67] *Crawford Fitt Co. v J.T. Gibbons, Inc,* 482 US 437 (1987).

[68] *Crawford Fitt Co,* at 442.

statute controlled, rather than the more general court rule stating[69]:

> As always, "'where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v Touche Ross & Co*, 426 US 148, 153 (1976), quoting *Morton v Mancari*, 417 US 535, 550-551 (1974) (emphasis added).

Based on this analysis, in the instant cases, to the extent that there is a conflict, the more specific PLRA statutory provisions control, rather than the more general court rule. The PLRA's unique requirements for pre-service judicial screening and mandatory exhaustion, conflict with general provisions of Federal Rules of Civil Procedure 8, 9 and 15. Under these circumstances, the PLRA controls.

Similarly, in *Radzanower v Touche Ross & Co*, this Court addressed repeals by implication when construing two statutes recognizing a "cardinal rule" of statutory construction is that repeals by implication are disfavored, but *Radzanower* recognized that there are two categories of repeals by implication[70]:

> "(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."

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[69] *Crawford Fitt Co*, at 445 (emphasis in Crawford).
[70] *Radzanower v Touche Ross & Co*, 426 US 148, 154 (1976).

In the instant cases the PLRA does cover the whole subject of Rule 9, since the statute has a unique provision allowing defendants to waive a reply and requiring the court to determine whether the prisoner has a reasonable opportunity to prevail on the merits, prior to requiring defendants to respond to the complaint. The standard acknowledged by this Court in *Kremer,* "an implied repeal must ordinarily be evident from the language or operation of a statute," is clearly evident in the PLRA.[71]

Additionally, lower courts have consistently ruled that the Rules Enabling Act's suppression clause[72] provides that subsequent procedural statutes passed by Congress supersede any prior, conflicting Federal Rule. And they have specifically held that PLRA provisions supersede conflicting earlier-adopted court rules.[73] Here, where the later-enacted PLRA sets forth a unique procedure for screening prisoner litigation prior to service of process, the PLRA conflicts with the generally applicable provisions of the earlier-adopted Rules 8, 9 and 15, and the PLRA controls. As the Court of Appeals, in its *Baxter* decision, recognized[74]:

> Unlike in typical civil litigation, courts discharging their screening duties under the PLRA must not wait until the complementary rules of civil procedure, such as civil discovery or responsive motions, are implemented by the

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[71] *See, Kremer v Chemical Construction Corp,* 456 US 461, 470 (US 1982)(deciding two statutes could be read consistently and finding no implied partial repeal).

[72] 28 USC § 2072(b).

[73] For example: *Callihan v Schneider,* 178 F3d 800, 802-03 (CA 6 1999)(holding the PLRA repealed earlier-enacted provisions of F R Civ P 24(a)); *Floyd v United States Postal Service,* 105 F3d 274, 277-78 (CA 6 1997)(holding that where the PLRA conflicts with the earlier-adopted F R Civ P 24(a), the statute controls); and *Jackson v Stinnett,* 102 F3d 132, 135-36 (CA 5 1996)(holding the PLRA repeals F R Civ P 24(a) to the extent of the conflict between the two).

[74] *Baxter,* 305 F3d at 490.

> defendant. While the Federal Rules of Civil Procedure shift the burden of obtaining clarity to the defendant, the PLRA shifts that burden to the courts. The heightened pleading requirement, in cases to which the PLRA applies, effectuates the PLRA's screening requirement.

F. This Court's rulings rejecting judicially-created heightened pleadings standards do not control here.

In *Baxter* the Court of Appeals also appropriately distinguished *Swierkiewicz v Sorema*. Unlike the **judicially-created** heightened pleading requirements that this Court struck down in *Swierkiewicz*, the PLRA's heightened pleading requirement is inherent in the **statute**.[75] *Swierkiewicz* involved plaintiff's claim for employment discrimination. In *Swierkiewicz*, this Court noted that the complaint stated claims upon which relief could be granted.[76] But that is not the case here, where the PLRA provides that "no action shall be brought" absent exhaustion of administrative remedies.[77] In prison litigation regarding conditions of confinement, where the plaintiff does not allege exhaustion the plaintiff fails to state a claim and fails to show a reasonable opportunity to prevail on the merits. Under these circumstances 42 USC § 1997e(a) of the PLRA requires dismissal without prejudice, and 28 USC § 1997(g) forbids requiring any response from a defendant.

Further, the analogy to employment discrimination cases that require exhaustion of administrative remedies does not fit the instant case, because employment discrimination cases are not subject to pre-service screening as PLRA cases are. This Court noted in *Swierkiewicz* that: "The prima facie

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[75] *Swierkiewicz v Sorema NA*, 534 US 506 (2002).
[76] *Swierkiewicz*, 534 US at 514.
[77] 42 USC § 1997e(a).

case under *McDonnell Douglas* [*Corp. v Green*, 411 US 792 (1973)], however, is an evidentiary standard, not a pleading requirement."[78] Further, in *Swierkiewicz*, this Court relied on the fact that not every employment discrimination case required proof of all elements of the prima facie case[79]:

> Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.

But this is not true in the instant case, where the requirement to exhaust administrative remedies does apply to every suit that the PLRA encompasses, and where exhaustion of administrative remedies is a pleading requirement.

Unlike in an employment discrimination case, the unique PLRA screening process does require a prisoner to state a claim upon which relief can be granted and show a reasonable opportunity to prevail on the merits in the initial complaint, or experience dismissal without prejudice. The *Swierkiewicz* decision is not controlling here.

Similarly, *Leatherman v Tarrant* is distinguishable.[80] *Leatherman* was a suit against a municipality based on 42 USC § 1983. In that case the Fifth Circuit applied a judicially-created heightened pleading standard that had been adopted in that circuit, and dismissed the case. This Court concluded that federal courts cannot adopt a more demanding pleading

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[78] *Swierkiewicz*, 534 US at 510.
[79] *Swierkiewicz*, 534 US at 511.
[80] *Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit*, 507 US 163 (US 1993).

standard than that embodied in Rules 8 and 9, noting that if the Federal Rules were to be rewritten, they might indeed include a heightened pleading standard for such municipal liability claims. In the absence of amendments to the Federal Rules of Civil Procedure imposing a heightened pleading standard, this Court held, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[81] The *Leatherman* decision does not take into consideration the "new regime" ushered in by the PLRA. The PLRA requires the courts to sort out meritless claims prior to service of process on any defendant. The PLRA supersedes the Federal Rules to the extent those rules, as applied by *Leatherman,* required the litigants and the courts to wait until summary judgment to weed out unmeritorious claims.

Similarly, *Crawford-El v Britton* is not contrary to the Court of Appeals' decisions in the instant cases.[82] The plaintiff-inmate claimed that prison staff retaliated against him for exercising his First Amendment rights by intentionally losing his property when he was transferred from prison to prison. The DC Circuit established a new rule requiring "clear and convincing evidence" of improper motivation for all civil rights cases. This Court rejected the clear and convincing evidence standard, stating that neither 42 USC § 1983 nor other federal statutes required imposing this standard on civil rights cases. This Court noted that the DC Circuit rule applied not just to cases brought by prisoners[83]:

> The new rule established in this case is not limited to suits by prisoners against local officials, but applies to all classes of plaintiffs bringing damages actions against any government official, whether federal, state or

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[81] *Leatherman,* 507 US at 168-69.
[82] *Crawford-El v Britton,* 523 US 574 (1998).
[83] *Crawford-El,* 523 US at 585 (footnotes omitted).

> local. See *Butz v Economou*, 438 US 478, 500-504; 57 L Ed 2d 895; 98 SCt 2894 (1978). The heightened burden of proof applies, moreover, to the wide array of different federal law claims for which an official's motive is a necessary element, such as claims of race and gender discrimination in violation of the Equal Protection Clause, cruel and unusual punishment in violation of the Eighth Amendment, and termination of employment based on political affiliation in violation of the First Amendment, as well as retaliation for the exercise of free speech or other constitutional rights.

Importantly, in *Crawford-El* this Court recognized the PLRA was designed to address the problems with the large number of prisoner lawsuits and their frequently meritless claims. But the state of mind issue that prompted the DC Circuit to establish a heightened pleading requirement with respect to all civil rights claims, this Court found, was not addressed in the PLRA[84]:

> Most significantly, the statute draws no distinction between constitutional claims that require proof of an improper motive and those that do not. If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation.

In the instant cases, in contrast, the issues have been addressed by Congress in the PLRA, that is, the need for initial screening by the courts and the mandatory exhaustion requirement have

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[84] *Crawford-El*, 523 US at 597.

superseded the usual rules that apply to civil rights cases in general.

II. The PLRA requires the inmate to plead and demonstrate exhaustion as to all defendants.

The Court of Appeals' application of the PLRA in the instant cases comports with a premier purpose of that act: to decrease the quantity and increase the quality of prisoner litigation. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and are devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. The PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete for all claims, before requiring a defendant to respond to the complaint. The PLRA relieves the defendant from the general requirement to promptly file an answer after service of a complaint and provides that "[t]he court may require any defendant to reply to a complaint . . . if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."[85] This language supports the Court of Appeals' interpretation of the PLRA requiring plaintiffs to plead and demonstrate exhaustion. Where exhaustion is mandatory, but the plaintiff has not alleged exhaustion, a district court could not find that the plaintiff had a reasonable chance to prevail on the merits and could not find that the plaintiff stated a claim upon which relief could be granted.

A. To the extent that F R Civ P 8 and 15 do not countenance the pre-service screening aspect of the PLRA, they are superseded by the statute.

Federal Rule of Civil Procedure 8 provides in pertinent part: A pleading which sets forth a claim for relief, . . . shall

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[85] 42 USC § 1997e(g)(2)(emphasis added).

contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . .

In *Swierkiewicz v Sorema,*[86] the most recent decision of this Court rejecting a judicially-imposed heightened pleadings requirement, this Court quoted from *Scheuer v Rhodes,*[87] which stated the following in explaining the notice pleading concept:

> When a federal court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test.

But this standard as explicated by this Court in 1974 is the backdrop to the later-enacted PLRA judicial screening requirements. In stark contrast to *Scheuer's* pleading requirement, consider 42 USC § 1997e(g)(2) which provides:

> The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

This PLRA provision is a keynote in Congress's intent to adopt a new regime with respect to pleadings in federal litigation brought by prisoners.

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[86] *Swierkiewicz*, 534 US at 511, 513.
[87] *Scheuer v Rhodes*, 416 US 232, 236 (1974).

Discussing F R Civ P 8 (a), standards this Court stated: "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[88] But the statute at issue here does not countenance waiting until discovery to dispose of unmeritorious claims. The general provisions of the Rule 8 are therefore superseded by the specific PLRA statutory provisions.[89] Under Rule 8 "a complaint need only provide 'fair notice' of what the plaintiff's claim is and the grounds upon which it rests'."[90] The PLRA requires a much more specific showing.

Similarly, F R Civ P 15(a)'s direction to freely permit amendment of the complaint when justice requires it appears to be at odds with mandatory exhaustion in combination with the PLRA's judicial screening process. Rule 15 can be interpreted, in light of the PLRA's provisions, to deny amendments because justice requires denial. In the alternative, to the extent there is a conflict between Rule 15(a) and the statute, the statute takes precedence.[91]

In *Baxter v Rose* the Court of Appeals held: "a prisoner may not amend his complaint to cure the failure to plead the exhaustion of administrative remedies, if his action is covered by the PLRA."[92] The Court of Appeals cited all of the sua sponte screening provisions of the PLRA, stating: "[T]he heightened pleading standard permits federal courts to determine whether the claim can be decided on the merits, without inefficiently expending judicial resources on evidentiary hearings and responsive pleadings."[93] And the

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[88] *Swierkiewicz v Sorema NA*, 534 US at 512.

[89] See discussion Arg. I. E, *supra*.

[90] *Mayle v Felix*, 545 US __; 125 SCt 2562, 2570; 162 L Ed 2d 582 (2005)(quoting *Conley v Gibson*, 355 US 41, 47 (1957)).

[91] *Baxter*, 305 F3d at 489-90.

[92] *Baxter*, 305 F3d at 488.

[93] *Baxter*, 305 F3d at 488.

Court of Appeals emphasized: "The possibility of amendment undermines the screening process, preventing courts from efficiently evaluating whether the plaintiff met the exhaustion requirement."[94] The Tenth Circuit's opinion in *Plunk v Givens* concurs with this analysis: "[T]he plain language of § 1915A makes clear that the "statute . . . does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal." [95]

Similarly, as the Court of Appeals recognized in *Baxter*, there is tension between F R Civ P 15(a)'s provision that leave to amend a complaint should be freely given and the PLRA's initial screening requirement.[96] But *Baxter* correctly held that "A plaintiff who fails to allege exhaustion of administrative remedies though 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*."[97]

The model instituted by the PLRA – screening by the court before requiring a defendant to respond – is the one habeas corpus uses and this Court recently noted that it is appropriate to look to the body of habeas corpus law for guidance in interpreting the PLRA.[98] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides that district courts "must promptly examine" state habeas petitions and must dismiss the petition sua sponte "if it plainly appears . . . that the petitioner is not entitled to relief."[99] Habeas corpus procedures also employ heightened pleading. Rule 2 requires that the petition must "specify all the

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[94] *Baxter*, 305 F3d at 489.

[95] *Plunk v Givens*, 234 F3d 1128, 1130 (CA 10 2000); But *see*, *Lira v Herrera*, 427 F3d 1164 (CA 9 2005).

[96] *Baxter*, 305 F3d at 489 n 3.

[97] *Baxter*, 305 F3d at 489 (citing *Knuckles El v Toombs*, 215 F3d 640, 642 (CA 6 2000); *Brown*, 139 F3d at 1104.

[98] *Woodford*, 126 SCt at 2384.

[99] *Day v McDonough*, 547 US __; 126 SCt 1675, 1683; 164 L Ed 2d 276 (2006).

grounds for relief available to the petitioner: and "state the facts supporting each ground."[100] This is "more demanding" than F R Civ P 8 notice pleading.[101] This standard applies notwithstanding that over 90% of habeas petitioners are pro se.[102] It follows that, in order to screen cases under the PLRA, it too requires heightened pleading.

Further, the PLRA judicial screening requirements are analogous to the law of qualified immunity, in that the PLRA effectively accord defendants "an entitlement not to stand trial or face the other burdens of litigation" including discovery, until the district court conducts the mandatory screening process and concludes the prisoner has a "reasonable opportunity to prevail on the merits."[103]

B. To the extent that F R Civ P 9 does not countenance the lack of an answer and pre-screening aspects of the PLRA's new regime, the PLRA controls.

To the extent there is conflict, the PLRA also supersedes F R Civ P 9. While Rule 9(c) indicates that conditions precedent may be pleaded generally, it also states that a "denial of performance . . . shall be made specifically and with particularity." But this provision contemplates an adversarial scenario, while the PLRA provides for *sua sponte* screening. And Congress emphasized that judicial screening must precede any involvement by any defendant in multiple PLRA provisions. Congress could not have made this any clearer than in 28 USC § 1915A(a) which provides that judicial screening must occur "before docketing if feasible or in any event, as soon as practicable after docketing. . . ." Under the PLRA the court must determine from the complaint alone

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[100] *Mayle*, 125 SCt at 2570.
[101] *Mayle*, 125 SCt at 2570.
[102] *Duncan v Walker*, 533 US 167, 191 (2001)(Breyer, J., dissenting).
[103] *Saucier v Katz*, 533 US 194, 200-01 (2001)(discussing immunity from suit effected by qualified immunity).

without any input of any kind by any defendant whether "the plaintiff has a reasonable opportunity to prevail on the merits."[104] The PLRA therefore requires the complaint itself to provide the specificity necessary to allow the court to determine whether or not the plaintiff is reasonably likely to prevail on the merits. In *Woodford*, this Court stated: "Construing § 1997e(a) to require proper exhaustion also fits with the general scheme of the PLRA, whereas respondent's interpretation would turn that provision into a largely useless appendage."[105] In the instant case, treating the exhaustion requirement as an affirmative defense would render the PLRA's requirement for the court to determine whether the prisoner has a reasonable likelihood of prevailing on the merits an impossible or worthless endeavor. Rule 9's provisions, which contemplate an adversarial process, are therefore superseded by the PLRA and exhaustion cannot be treated as an affirmative defense.

The scenario Petitioners pose, where exhaustion would be treated as an affirmative defense in fact proves too much. This is because if the complaint alone does not show that it states a claim upon which relief can be granted and that plaintiff has a reasonable opportunity to prevail on the merits, the court is compelled to dismiss the action without ever requiring a defendant to respond to it.

C. The Prison Litigation Reform Act requires a prisoner to identify a particular prison official during the grievance process in order to sue that person.

The Court of Appeals, in the present case and in several earlier cases, properly interpreted the PLRA's exhaustion language to require prisoners to identify in their grievances, the

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[104] 41 USC § 1997e(g)(2).
[105] *Woodford*, 126 SCt at 2387.

particular officers they intend to sue.[106] This requirement is necessary to allow the courts to conduct pre-service screening to determine whether the inmate has properly exhausted all administrative remedies. Further, this interpretation is consistent with the plain language of the statute because it furthers the objectives of increasing the quality and decreasing the quantity of prisoner lawsuits.

Petitioners' interpretation of the statute would effectively render the statute meaningless. If all a prisoner is required to do is simply describe the problem being grieved, there would be no meaningful record developed and judicial screening would be hampered. For example, under the Petitioners' view of the statute, a prisoner could say, "Someone hurt me in my cell," and that would suffice to put prison officials on notice of a problem. Prison officials could not possibly address that kind of problem internally under such a scenario. Yet, under the Petitioners' "notice" rule, it would be sufficient to satisfy the PLRA exhaustion requirement. This Court recently noted that Congress did not intend to create a "toothless" scheme when it passed the Prison Litigation Reform Act.[107] Petitioners' interpretation would effectively turn the exhaustion requirement into a "useless appendage."[108] The Petitioners assert that the naming rule is inconsistent with one of the PLRA's purposes, which was to alert prison officials of problems in their prisons. Again, a grievance that lists no names, descriptions or job titles does not develop the administrative record the PLRA requires. Without identifying the individual who caused the problem, prison officials would be hard pressed to resolve the problem.

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[106] *Curry*, 249 F3d at 505; *Burton v Jones*, 321 F3d 569, 575 (CA 6 2003); *Thomas v Woolum*, 337 F3d 720, 735 (CA 6 2002)(overruled on other grounds by *Woodford*).

[107] *Woodford*, 126 SCt at 2388.

[108] *Woodford*, 126 SCt at 2387.

This Court recognized the proper exhaustion standard in *Woodford*[109]:

> The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules.

A rule requiring a prisoner to identify all of the officials in the grievance process prior to filing suit, and to exhaust administrative remedies as to each of them also helps further the goal of creating an administrative record for the district court to review. This Court has held that creating an administrative record is an important purpose behind the PLRA "for cases ultimately brought to court adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[110] Moreover, requiring prisoners to identify the individuals who allegedly wronged them provides prison officials with fair notice of the claims against them. The Court of Appeals in supporting its decision to adopt a naming requirement concluded that the Court did not impose a heightened pleading requirement upon prisoners.[111] Instead, the naming rule only assures that, as envisioned under the PLRA, the prison system had a chance to deal with complaints against prison staff prior to those complaints reaching federal court, and it allows the court to determine whether the plaintiff has exhausted all administrative remedies against all defendants.[112]

Two Circuits (the Sixth and the Eighth) do require prisoners to identify individuals during the administrative grievance process, and exhaust administrative remedies as to

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[109] *Woodford*, 126 SCt at 2388.
[110] *Porter*, 534 US at 525.
[111] *Curry*, 249 F3d at 505.
[112] *Curry*, 249 F3d at 505.

them, before they can sue the individuals in a federal court.[113] Those courts have held that a failure to do so requires a dismissal without prejudice. Three Circuits (the Third, Fifth, and Eleventh) do not require prisoners to specifically name in the grievance proceedings the prison officials they later sue in federal court.[114] Rather, those three Circuit Courts require that prisoners must provide fair notice in the grievance process to those they later sue in federal court. Two circuits (the Seventh and Ninth) expressly rejected a rule requiring prisoners to name in the grievance process those they later sue in federal court and instead only require that prisoners generally describe the problem in order to satisfy the PLRA's exhaustion requirement.[115]

The approach adopted by the Seventh and Ninth Circuits is contrary to the overall purpose of the PLRA.[116] The approach adopted by the Seventh and Ninth Circuits that only requires prisoners to generally describe a problem in the grievance process as a prerequisite to exhaustion allows prisoners to circumvent the PLRA. Merely describing a problem does not allow prison officials an opportunity to take appropriate action against the potential wrong-doer. Nor does it provide the prison officials with any sort of fair notice that the staff member's behavior is inappropriate. Such a rule would ensure that the administrative records in most cases would be of little or no value to the district court. Similarly, the rule adopted by the Third, Fifth, and Eleventh Circuits would frustrate the policy objectives of the PLRA because it would do little, if anything, to create an accurate administrative record. As this Court noted in imposing a proper exhaustion requirement, "[P]roper exhaustion improves the quality of

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[113] *Curry*, 249 F3d at 505; *Burton*, 321 F3d at 575; *Thomas*, 337 F3d at 735; *Kozohorsky v Harman*, 332 F3d 1141 (CA 8 2003).

[114] *Spruill v Gillis*, 372 F3d 218 (CA 3 2004); *Johnson v Johnson*, 385 F3d 503 (CA 5 2004); *Brown v Sikes*, 212 F3d 1205 (CA 11 2000).

[115] *Ricardo v Rausch*, 375 F3d 521 (CA 7 2004); *Butler v Adams*, 397 F3d 1181 (CA 9 2005).

[116] *Ricardo*, 375 F3d at 524; *Butler*, 397 F3d at 1183.

these prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the Court."[117] Requiring prisoners to identify those individuals they intend to sue in their grievances undoubtedly will improve the quality of prison suits. Requiring that prisoners do no more than describe a situation in their grievance would undercut Congress's intent in requiring exhaustion of administrative remedies.

Petitioners also claim that the short grievance deadlines would make it nearly impossible for a prisoner to satisfy the naming requirement. As a practical matter, it is not difficult for prisoners in Michigan to name the individual or individuals they intend to sue. Michigan has a policy directive, PD 02.03.103, Employee Uniforms, ¶ I (effective November 18, 2002), that requires all MDOC employees to wear name tags while on duty. Previous versions of the policy contained the same requirement. It is not too much to ask a prisoner to read a name tag prior to filing a grievance. This Court recently recognized that "[P]risoners who litigate in federal court generally proceed in *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements."[118] Requiring prisoners to do nothing more than read a name tag or ask a prison official for a staff member's name cannot be considered unforgiving. Petitioner Jones in response to the Court's order requiring him to name the John and Jane Does he wanted to sue, promptly informed the Court of Konkle and Aldabagh's names. Jones thus demonstrated the ability to name specific individuals.

This Court has held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[119] In order to carry out that purpose the Court of Appeals properly interpreted the PLRA to require that a

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[117] *Woodford*, 126 SCt at 2388.
[118] *Woodford*, 126 SCt at 2393.
[119] *Porter*, 534 US at 528.

prisoner name individuals in the grievance process, and exhaust administrative remedies as to them, before being permitted to bring a federal lawsuit against them.

It is important to note that since the Petitioners filed their individual grievances the MDOC's grievance policy has undergone a revision. At the time the Petitioners filed their grievances pursuant to Michigan Department of Correction's Grievance Policy, PD 03.02.130, ¶ U (effective November 1, 2000) (JA I, p 138) prisoners were required to "[B]e as specific as possible." Under the old policy, applicable to Petitioners Williams and Walton, they failed to ever identify or describe all of the parties they intended to sue. For example, Walton did no more than name Respondent Bobo in his grievance. Yet, he sued five other individuals. Even under the old policy directive, Walton was not specific enough to satisfy the more relaxed standard found in *Thomas* in which the Court of Appeals held that prisoners "[N]eed not identify each officer by name when the identities of the particular officers are unknown . . ."[120] Walton presented no evidence in the District Court that he did not know the identities of the other five parties to the lawsuit, and made no attempt to "be as specific as possible" and identify them by job title, shift or physical description.

In late 2003, after all the grievances in the instant case had been filed, MDOC changed its policy. The current version of Policy Directive 03.02.130, ¶ T (effective December 19, 2003) (Respondents' Appendix, *infra,* p 1b) does require prisoners to specifically name prison officials they intend to grieve. Providing: "Dates, times, places and names of all those involved in the issue being grieved . . ." Proper exhaustion, as *Woodford* provides, will require grievants, from December 19, 2003 forward, to provide these details in their grievances. Again, if the inmate does not know and cannot determine the name of the staff member involved, explaining this and providing a physical description, job title, shift and/or other

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[120] *Thomas*, 337 F3d at 734.

details that will allow state officials to identify the staff member will suffice even under the new policy.

Contrary to the Petitioners' assertion on page nine of their brief, the new policy, PD 03.02.130 ¶ T (effective December 19, 2003) is very relevant to future cases. Since, at least in Michigan, prisoners are now required to name those they intend to grieve, per the current grievance policy, prisoners cannot properly exhaust as required by *Woodford* if they do not name the person they intend to grieve. If this Court adopts a rule in which prisoners are only required to put prison officials on notice of a problem it would invalidate a portion of Michigan's grievance policy. Furthermore, a rule requiring prisoners to do nothing more than give prison officials notice of a problem would run afoul of this Court's holding in *Porter* because it would have the effect of decreasing the quality of prisoner lawsuits by allowing a diminished administrative record.[121]

D. This Court's decision in *Sims v Apfel* in which this Court rejected a judicially created issue-exhaustion requirement is easily distinguishable from the instant cases.

Petitioners cite *Sims v Apfel* for the proposition that the naming requirement is inconsistent with the language of the PLRA.[122] *Sims* is distinguishable from this case.

In *Sims* this Court reversed a decision from the Fifth Circuit and held that a judicially created issue-exhaustion requirement was inappropriate in the context of a Social Security Administration (SSA) hearing before an Administrative Law Judge.[123] This Court reasoned that since there are pronounced differences between SSA hearings and the Courts, it was unfair to impose an issue-exhaustion

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[121] *Porter*, 534 US at 525.
[122] *Sims v Apfel*, 530 US 103 (2000).
[123] *Sims*, 530 US at 112.

requirement on parties to such hearings. Ultimately this Court held that since the Social Security Appeals Council and the claimant described the issues at the hearing, exhaustion did not make any sense in the context of an SSA hearing.[124]

First, *Sims* is distinguishable because here, there is a statutory mandate for exhaustion, not a judicially-created requirement. And, the PLRA and *Woodford* undercut the Petitioners' argument. This Court held in *Woodford* that proper exhaustion of administrative remedies is necessary to satisfy the PLRA's exhaustion requirement.[125] According to this Court, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudication system can function effectively without imposing some ordered structure on the course of its proceedings."[126] Unlike *Sims,* which dealt with SSA hearings, *Woodford* specifically dealt with the PLRA. Consequently, *Woodford's* proper exhaustion standard applies as opposed to the more general *Sims* standard.

Second, *Sims* turned on the fact that the Appeals Council had primary responsibility for choosing and elaborating on the issues. Under the PLRA, in contrast, the prisoner has full control of naming and developing the issues.

E. The naming convention applied by the Court of Appeals is completely in accord with proper exhaustion requirements set forth in *Woodford.*

The Court of Appeals' naming requirement is consistent with proper exhaustion. Merely putting prison officials on notice of a problem, without naming the individual or individuals involved, does not give prison officials enough information to resolve the problem. The naming requirement is necessary even in the absence of a specific policy requiring it.

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[124] *Sims,* 530 US at 112.
[125] *Woodford,* 126 SCt 2382.
[126] *Woodford,* 126 SCt 2386.

As noted above, proper exhaustion requires prisoners to comply with an agency's procedural rules. Respondents submit that the PLRA requires prisoners to name in the grievance process those they later sue even absent a specific state policy requiring them to do so. Even if at the time the initial grievance is filed, the inmate does not know the names of all those involved, the inmate must provide sufficient information that all individuals can be identified as the grievance and appeal process proceeds. Only then can the grievance process function effectively and allow prison officials to fully address the claims in the administrative stage.

F. These rules are not unduly punitive.

Finally, requiring total exhaustion of all claims and heightened pleadings is not unduly punitive.[127] It is true that prisoners who do not totally exhaust all of their claims will have to re-file their complaint and most courts will assess another filing fee.[128] But this would provide a significant incentive to conform with the total exhaustion requirement before filing suit. And, prisoners can still proceed *in forma pauperis* when they qualify for that status. As inmates have learned that they must plead and show total exhaustion in the habeas corpus context, they will likewise learn that they must plead and show total exhaustion in all federal civil litigation.[129]

The total exhaustion requirement further gives prisoners a strong incentive to exhaust all of their administrative remedies as to all claims, before bringing their cases to court. This Court rejected the respondent's argument in *Woodford* that requiring proper exhaustion would be harsh for prisoners who

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[127] *Jones Bey*, 407 F3d at 808.

[128] But not in the Sixth Circuit, where the Court held on August 29, 2006, that an inmate who re-files after dismissal is not "initiating" a lawsuit, and therefore no filing fee will be assessed. *Owens v Keeling*, ___ F 3d ___; 2006 US App Lexis 22077 (CA 6 2006).

[129] *See*, *Rose v Lundy*, 455 US at 520.

are generally untrained in the law and are frequently poorly educated. "This overlooks the informality and relative simplicity of prison grievance systems like California's as well as the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements."[130] The same is true with respect to the issues addressed in this case. Inmates can be expected to comply with the requirement to properly exhaust administrative remedies, and they can similarly be expected to comply with the total exhaustion and specificity in pleadings requirements. In the habeas corpus context, this Court characterized the total exhaustion requirement as "simple and clear."[131] The very similar PLRA requirements are also simple and clear.

In the event the inmate experiences a dismissal due to lack of total exhaustion based on his original filing, that inmate will have the time to correct any errors and refile.[132] Placing this burden on the inmate rather than requiring the court to essentially edit and redraft the complaint for the inmate, is consistent with the purposes of the PLRA. Thus, they will not be denied an opportunity to proceed on all properly exhausted claims.

The heightened pleadings requirement is inherent in the PLRA. Without a complaint pleading and demonstrating

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[130] *Woodford*, 126 SCt at 2393.

[131] "This scheme reinforces the importance of Lundy's 'simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.'" (*Rhines v Weber*, 544 US 269, 276-77 (2005), quoting *Rose v Lundy* 455 US 509 (1982)).

[132] The statute of limitations is not a concern because the statute is tolled while the inmate exhausts administrative remedies. *Brown v Morgan*, 209 F3d 595 (CA 6 2000). Further, from the date of service on the defendant, until the dismissal without prejudice, the statute of limitations is also tolled. Once the case is dismissed, the statute resumes running. So Petitioners are not disadvantaged by the dismissal without prejudice. *Federal Kemper Ins. Co. v Issacson*, 145 Mich App 179 (1985).

exhaustion of administrative remedies as to all defendants, the mandatory exhaustion requirement in combination with the judicial screening requirement for making a determination that the plaintiff has a reasonable opportunity to prevail on the merits, requires dismissing the complaint. Petitioners have no explanation of how the courts can determine whether the plaintiff has a reasonable opportunity to prevail on the merits in the absence of heightened pleadings. The PLRA requires the inmate to make a full administrative record and requires the Court to screen cases as soon after filing as is feasible. It is only logical that the inmate must make the administrative record available to the Court at the initial screening stage.

III. The PLRA requires total exhaustion; complaints containing both exhausted and unexhausted claims must be dismissed without prejudice in their entirety.

A. The plain language of the statute requires total exhaustion.

The language of the PLRA requires total exhaustion. First, 42 USC § 1997e(a) provides[133]:

> No **action** shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other Correctional facility until such administrative remedies as are available are exhausted.

Two features of this section of the statute demand total exhaustion. First is the requirement that no action shall be brought until all available administrative remedies have been exhausted. If there are claims pending that have not been exhausted, then obviously available administrative remedies

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[133] 42 USC § 1997e(a)(emphasis added).

have not been pursued, and the statute mandates dismissal. When an **action** contains both exhausted and unexhausted claims, it cannot be said, with respect to that action, that available administrative remedies have been exhausted. Where an inmate attempts to bring federal court claims against two corrections officers for the same or similar alleged unlawful behavior (e.g., denying him medication), where the inmate exhausts remedies against one officer, but not the other, plainly, the inmate has not exhausted all remedies that are available. If the administrative proceedings against the second officer are not exhausted, then the inmate may yet have a remedy through the state grievance system, since the claim might be resolved short of litigation in the grievance against the second officer. Based on this resolution, the entire issue could be settled, (e.g., the inmate might obtain the medication in dispute) and a lawsuit entirely avoided. In this way total exhaustion serves the PLRA purposes of decreasing the quantity of prisoner litigation, and allowing state officials the opportunity to correct problems before the federal courts become involved.

Second, the use of the term "action" as opposed to "claim" indicates that Congress meant for the entire case to be dismissed, rather than just the unexhausted claim or claims. Congress distinguished between the terms "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts shall dismiss "[A]ny **action** that is frivolous, malicious or fails to state a claim."[134] The very next section provides that a court may dismiss a **claim** if it is frivolous, malicious, or fails to state a claim.[135] Congress drew a distinction between a "claim," which is an individual allegation, and an "action," which is an entire lawsuit.[136] The use of the word "claims" in the PLRA indicates that claims are individual allegations while actions are entire lawsuits. As the

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[134] 42 USC § 1997e(c)(1).
[135] 42 USC § 1997e(c)(2).
[136] *Jones Bey*, 407 F3d at 807.

Sixth Circuit noted in making the distinction between the terms "action" and "claim"[137]:

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.

Third, reading the plain language of the statute to require dismissal of the entire action where one or more claims remain unexhausted does not make any portion of the statute superfluous.[138] Looking at the three pertinent portions of the subsections of 42 § USC 1997e affirms this:

> § 1997e. Suits by prisoners
>
> (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility

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[137] *Jones Bey*, 407 F3d at 807.

[138] *Hibbs v Winn*, 542 US 88, 101 (2004)(providing that all statutes must be read to give all provisions effect and no provision is read to be superfluous).

> until such administrative remedies as are available are exhausted.
>
> * * *
>
> (c) Dismissal.
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

In a nutshell: 1997e(a) provides that the court must dismiss the case without prejudice if there is any unexhausted claim; 1997e(c)(1) requires the court to dismiss meritless actions, most often with prejudice; and 1997e(c)(2) provides that the court has the option to sort through the claims and dismiss meritless claims with prejudice, without the necessity of addressing the exhaustion issue as to meritless claims. This provision also serves to show exhaustion is not jurisdictional.[139]

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[139] *Woodford*, 126 SCt at 2392.

1. § 1997e(a) requires dismissal without prejudice for failure to exhaust administrative remedies.

As this Court stated in *Woodford v Ngo* in interpreting § 1997e(a): ". . . saying that a party may not sue in federal court until the party first pursues **all** available avenues of administrative review necessarily means that if the party never pursues **all** available avenues of administrative review, the party will never be able to sue in federal court."[140] The statute thus plainly provides that if an inmate does not pursue all administrative remedies, he cannot sue in federal court. This is the essence of the total exhaustion requirement. If one claim is left unexhausted, the action shall not be brought.

Petitioners contend that because Congress did not add "or include any unexhausted claims" as a reason for dismissal of the entire action under 1997e(c)(1), means that there is no total exhaustion requirement. This contention erroneously assumes that 1997e(a) in itself does not require dismissal of the action where an inmate fails to exhaust administrative remedies. A requirement that no action shall be brought absent exhaustion without a dismissal requirement would indeed be a mere suggestion, which cannot be what Congress intended. As this Court stated in *Woodford*, that "would be like copying the design of an airplane, but omitting one of the wings. And *Woodford* affirms that the PLRA exhaustion requirement is not toothless.[141] Exploring this Court's interpretations of exhaustion requirements in similar statutes in the administrative law context confirms that § 1997e(a) requires dismissal: "Exhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance."[142]

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[140] *Woodford*, 126 SCt at 2391 (emphasis added).
[141] *Woodford*, 126 SCt at 2388.
[142] *Woodford*, 126 SCt at 2384.

For example, in *Hallstrom v Tillamook County,* this Court interpreted a statute with a very similar exhaustion requirement.[143] The Resource Conservation and Recovery Act of 1976 (RCRA) provides that no action may be commenced against an alleged violator prior to 60 days after giving notice to the EPA, the State and the alleged violator. Plaintiff farmowners notified the county in writing and then started a lawsuit a year later. On March 1, 1983 the county moved for summary judgment on the ground that the farmowners had failed to notify the EPA and Oregon. The district court held the Plaintiff had cured any defect by notifying the EPA and Oregon on March 2, 1983, and the agencies would have 60 days to take appropriate steps to cure any violation at the landfill. The Ninth Circuit held that the farmowners' failure to comply with the notice and 60 day delay requirements deprived the district court of subject matter jurisdiction.

This Court affirmed, but held that there was no need to determine whether the requirement is jurisdictional or merely procedural. The Court held its decision would be given retroactive effect, though this case had been litigated for nearly 4 years and received a determination on the merits by the district court. ". . . [W]e hold that where a party suing under the citizen suit provision of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court **must dismiss the action as barred by the terms of the statute.**"[144] Similarly in the instant cases, where the inmates failed to comply with the PLRA requirement to exhaust all administrative remedies available to them, their cases were barred by the statute.

Hallstrom is a prime example of this Court's commitment to keep intact the incentive to properly exhaust all administrative procedures required by the statutes. Though dismissing the case for failure to exhaust after four years of

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[143] *Hallstrom v Tillamook County*, 493 US 20 (1989).
[144] *Hallstrom* 493 US at 33 (emphasis added).

litigation was contrary to judicial economy in the *Hallstrom* case itself, *Hallstrom* informs potential litigants that they need to comply with the plain statutory language and properly exhaust before suing. This will better serve judicial economy in the long run, undoubtedly solving some issues short of litigation and ensuring an administrative record is available prior to suit.

Similarly, in *McNeil* this Court interpreted a provision of the Federal Tort Claims Act that is very similar to 42 USC § 1997e(a).[145] The Federal Tort Claims Act (FTCA) provides in 28 USC § 2675(a) that an "action shall not be instituted upon a claim against the United States for money damages" unless the claimant first exhausts administrative remedies with the appropriate federal agency. In *McNeil,* an action filed by an inmate proceeding *pro se*, the question was whether an FTCA action could be maintained where the claimant failed to exhaust administrative remedies before filing suit, but accomplished exhaustion before substantial progress in the litigation. This Court held that it could not[146]:

> The command that an "action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail" is unambiguous. We are not free to rewrite the statutory text. As of March 6, 1989, petitioner had neither presented his claim to the Public Health Service, nor had his claim been "finally denied" by that agency. As the Court of Appeals held, petitioner's complaint was filed too early.

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[145] *McNeil v United States*, 508 US 106 (1993).
[146] *McNeil*, 508 US at 111.

The *McNeil* Court held that the appropriate response by the court was to dismiss the action[147]:

> The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

McNeil noted that "one objective" of the statute was to "reduce unnecessary congestion in the courts."[148] And *McNeil* expressly rejected the argument that the rigor of the statute should be relaxed because pro se prisoners are often the litigators: "[G]iven the clarity of the statutory text, it is certainly not a 'trap for the unwary.'"[149]

In addition to the administrative law cases supporting the dismissal requirement when an inmate fails to exhaust, there is case law involving actions by prisoners under 42 USC § 1983 that provides strong support for this requirement. In prisoner litigation under § 1983, this Court has specifically held that the absence of a precondition for suit means that the inmate has no cause of action. In *Heck v Humphrey*, this court held that before the inmate plaintiff could bring an action under 42 USC § 1983 that implied the invalidity of his conviction,

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[147] *McNeil*, 508 US at 112.
[148] *McNeil*, 508 US at 112 n 8.
[149] *McNeil*, 508 US at 113.

the plaintiff had to first reverse the conviction through appeal, habeas corpus, or other post-conviction remedies.[150] This Court stated: "We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action."[151] This court elaborated[152]:

> "[T]he § 1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor . . . so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

In *Edwards v Balisok* this Court, in dealing with this same issue, stated: "We reemphasize that § 1983 contains no judicially imposed exhaustion requirement, [citing *Heck*] absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed."[153] By analogy, the PLRA exhaustion requirement is a bar requiring dismissal because an action challenging prison conditions is not cognizable absent exhaustion of administrative remedies.

In the instant cases, of course, there is a statutorily-imposed exhaustion requirement. The analysis of this Court in *Heck* and *Edwards* applies here with even more force: Absent exhaustion, a claim is not cognizable and must be dismissed. The Court of Appeals recognized this in early decisions issued under the PLRA. In *Brown v Toombs*, the Court of Appeals held that where neither the District Court nor the Magistrate Judge had examined the complaint to determine whether the inmate had exhausted administrative remedies, the Court of

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[150] *Heck v Humphrey*, 512 US 477 (US 1994).
[151] *Heck*, 512 US at 489.
[152] *Heck*, 512 US at 489-90.
[153] *Edwards v Balisok*, 520 US 641, 649 (US 1997).

Appeals was required to sua sponte recognize the lack of exhaustion of administrative remedies, and order the case dismissed.[154]

2. § 1997e(c)(1) requires the court to dismiss meritless actions.

Section 1997e(c)(1) provides exceptions to § 1997e(a), by requiring that the court dismiss the entire action if it is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks money from a defendant who has immunity. Given the statutory criteria, most often dismissals under § 1997e(c)(1) would be with prejudice. It is logical that if an action has no chance for success that it must be dismissed with prejudice, regardless of exhaustion. If the action had no chance of success and the court dismissed it based on lack of exhaustion, the inmate could refile the case after exhaustion. Section 1997e(c)(1) ensures that the inmate will not waste further judicial resources by refiling the same meritless case after exhausting administrative remedies. This provision also serves judicial economy by dismissing plainly untenable actions without unnecessarily consuming judicial resources to make the exhaustion determination.

3. § 1997e(c)(2) Allows the court the option to sort out and dismiss all meritless claims

Finally, § 1997e(c)(2) provides that, regardless of whether all claims have been exhausted, the court has the option of dismissing individual claims with prejudice. Again, this would prevent the inmate from consuming additional judicial resources, on any individual claims for which success is impossible. And as this Court recently held in *Woodford*[155]:

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[154] *Brown v Toombs*, 139 F3d 1102 (CA 6 1998).
[155] *Woodford*, 126 SCt at 2392.

> [E]ven if dismissals under § 1997e(c)(2) typically occur when the opportunity to pursue administrative remedies has passed, § 1997e(c)(2) still serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, and thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.

The optional nature of this provision taken with the prior two mandatory sections, logically allows the district court to decide how to expend its resources: Would it be best to dismiss the entire action without prejudice for failure to exhaust, or to sort out claims that are plainly not viable, and dismiss those individual claims with prejudice, while dismissing the balance of the complaint without prejudice for failure to exhaust remedies? This comports with Congress's intent to streamline prisoner litigation: giving the court several options on how to deal most effectively with cases and claims that can never go forward, while still requiring dismissal of the entire action without prejudice for failure to exhaust, if that is the most expeditious method of dealing with the case. This reading is also consistent with the provision of the statute § 1997e(g) that allows waiver of reply and requires a determination that the case has "a reasonable opportunity to prevail on the merits" before a defendant can be required to respond. This plain reading of the statute demonstrates a role for each provision, and is consistent with the underlying policies for the statute: to decrease the numbers and to improve the quality of cases brought by prisoners.

4. Petitioners' analysis of the PLRA is flawed.

Petitioners argue that since § 1997e(c)(1) does not include as a reason for dismissal the words "or contains any unexhausted claims," then Congress did not mean for complaints containing unexhausted claims to be dismissed. But if § 1997e(c)(1) had included a direction to dismiss all actions that include unexhausted claims, then § 1997e(a) would be superfluous. And the statute cannot be read to make any provision superfluous.

Petitioners also argue that § 1997e(c)(2)'s reference to dismissal of unexhausted "claims" juxtaposed with the § 1997e(c)(1) reference to dismissal of an "action," means that unexhausted claims can be treated independently, for purposes of dismissal, from the action as a whole. Petitioners conclude that there would be "little point" in dismissing some actions on the merits if the remainder of the claims had to be dismissed, though exhausted, due to the unexhausted claims that had been dismissed on the merits. But this is not the only potential scenario these provisions could address. For example, if "action" is construed to mean "action" and "claim" is read as "claim" then § 1997e(c)(1) and (2) work together to require the district court to dismiss the entire action if it is meritless. But if the "action" is not meritless, then the court, in its discretion, may choose to dismiss any meritless "claim" regardless of exhaustion. This scenario makes sense because it gives the court the option to dismiss meritless claims under (c)(2) with prejudice so that they are never brought before the court again, regardless of whether the prisoner refiles any portion of the action after completing or demonstrating exhaustion. And the Court is relieved from examining plainly meritless claims to determine whether they have been exhausted, thus serving judicial efficiency.

Petitioners further argue that if "action" in § 1997e(a) means that the entire action must be dismissed if single claim is

unexhausted, then the word "action" in § 1997e(c)(1) must also mean that the entire action must be dismissed if a single claim is meritless. Petitioners argue this would make § 1997e(c)(2) superfluous. But this argument fails to take into account the other language of these two sections of the statute. Section 1997e(a) provides that "no action shall be brought . . . " unless all administrative remedies have been exhausted. If one claim is unexhausted, then the action "shall not be brought" by the plain language of this section. On the other hand, § 1997(c)(1) requires that when an "action" is meritless the "action" shall be dismissed.

These two sections of the statute do not make § 1997e(c)(2) superfluous, since that section allows for dismissal of meritless claims, regardless of exhaustion.

Finally, Petitioners argue that the § 1997e(e) argues in favor of a partial exhaustion rule. That section of the statute provides:

> LIMITATION ON RECOVERY. No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Petitioners contend that the use of the word "action" in this provision really means "claim" and that therefore the word "action" in § 1997e(a) also really means "claim." Petitioners argue that no court has interpreted "action" in § 1997e(e) to mean "action" but rather to mean "claim." Petitioners cite no case where any party has argued that in fact "action" does mean "action" in this statutory provision. If a party raises the question, the court may in fact assume action does mean action and dismiss the entire action. This would be consistent with

placing the burden on the inmate to come to court with a complaint that excludes clearly meritless claims.

5. Total exhaustion is not a trap for the unwary.

Petitioners argue that total exhaustion would constitute a trap for the unwary. But this Court dismissed the notion that exhaustion would constitute a trap for in pro se litigants. In *McNeil*, a case brought by a prisoner *pro se* this Court affirmed that procedural rules apply to lawyers and *pro se* litigants alike[156]:

> Moreover, given the clarity of the statutory text, it is certainly not a "trap for the unwary." It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error, but the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent. Our rules of procedure are based on the assumption that litigation is normally conducted by lawyers. While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, . . . and have held that some procedural rules must give way because of the unique circumstances of incarceration, see *Houston v Lack*, 487 US 266; 101 L Ed 2d 245; 108 SCt 2379 (1988) (pro se prisoner's notice of appeal deemed filed at time of delivery to prison authorities), we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. **As we have noted before, "in the long run, experience teaches that strict adherence to**

[156] *McNeil*, 508 US at 112 (emphasis added).

> **the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."** *Mohasco Corp v Silver,* 447 US 807, 826; 65 L Ed 2d 532; 100 S Ct 2486 (1980). The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. Because petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit.

Further, since in pro se inmates are already required, habeas corpus actions, to comply with total exhaustion, inmates can follow the same simple and clear procedural requirements in their other civil litigation.

B. Section 1997e(a)'s similarities to the habeas corpus statute support total exhaustion.

With respect to the requirement to exhaust administrative remedies, the habeas corpus statute and the PLRA are similar. The similarity cannot be coincidental. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was "enacted two days after the PLRA."[157] The habeas corpus statute, 28 USC § 2254(b)(1)(A) provides that the court cannot grant a petition unless the petitioner has exhausted the administrative remedies available in the courts of the State. But, the court can deny a petition on the merits, regardless of exhaustion.[158] In *Woodford*, this Court noted that it is appropriate to look to habeas corpus law for guidance in interpreting the PLRA.[159] Courts enforcing the PLRA's total exhaustion requirement rely on the similarities between the two statutes, since the exhaustion requirements in both "were

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[157] *Skinner v Wiley,* 355 F3d 1293, 1294 (CA 11 2004).
[158] 28 USC § 2254(b)(2).
[159] *Woodford*, 126 SCt at 2384.

created for similar reasons, their exhaustion rules should be interpreted in a similar manner."[160]

In 1982 this Court recognized a total exhaustion rule in the habeas corpus context in *Lundy*, finding "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the opportunity to review all claims of constitutional error."[161] The PLRA was enacted in the mid-nineties, when Congress was well aware of the *Lundy* holding. In the PLRA Congress similarly gives State officials the first opportunity to address inmate issues and strongly encourages prisoners to take advantage of state procedures. The *Lundy* court expounded on additional policy considerations supporting total exhaustion[162]:

> Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

These same policy considerations support total exhaustion in the PLRA.

Lundy rejected any suggestion of unnecessary lawmaking: "[O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies."[163] The *Lundy* decision stated there was no basis to believe the total exhaustion rule would "trap the unwary pro se prisoner."[164] Instead, this Court opined that "our interpretation of §§ 2254(b),(c) provides a **simple and clear** instruction to

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[160] *Jones Bey*, 407 F3d at 808.
[161] *Lundy*, 455 US at 518-19.
[162] *Lundy*, 455 US at 519.
[163] *Lundy*, 455 US at 519-20 (emphasis added).
[164] *Lundy*, 455 US at 520.

potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court."[165] This Court expressed confidence that prisoners would master the total exhaustion requirement. "Just as pro se petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement."[166]

Finally *Lundy* held: "In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims."[167] These same policy considerations provide foundation for the PLRA's total exhaustion requirement.

The instant Court of Appeals decisions holding that the PLRA requires total exhaustion is also an interpretation of a federal statute on the basis of its language and legislative history and consistent with the statute's underlying policies. In the PLRA context total exhaustion also relieves the court from having to sort through frequently lengthy and disorganized complaints to determine whether each and every claim is exhausted. Instead, the PLRA shifts the burden of either exhausting all claims, or sorting out the exhausted claims to the inmate, who has large blocks of time available to accomplish this task. And, in the PLRA context as well as the habeas context, inmates can master this simple total exhaustion requirement. Further, while many prisoners act pro se, this Court in *Woodford* also rejected any argument that such litigants cannot be expected to comply with exhaustion requirements:[168] "prisoners who litigate in federal court generally proceed pro se and are forced to comply with numerous unforgiving deadlines and other procedural

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[165] *Lundy*, 455 US at 520.
[166] *Lundy*, 455 US at 520 (emphasis added).
[167] *Lundy*, 455 US at 521.
[168] *Woodford*, 126 SCt at 2393.

requirements." Note that habeas petitioners must comply with exhaustion requirements also and 93% of them are in pro se.[169] The *Lundy* decision's reasoning, policy considerations and statutory language all support the Court of Appeals' decision implementing total exhaustion in the PLRA.

In another habeas corpus decision, *Rhines v Weber,* this Court reinterpreted the total exhaustion requirement.[170] Recognizing that ADEPA instituted a one-year statute of limitations that was not extant when *Lundy* issued, this Court held that a habeas petition could be stayed and held in abeyance under certain limited circumstances. While the petition was held in abeyance, the inmate could, by acting promptly, exhaust his state court remedies. In reaching this conclusion, this Court relied heavily on the language of the habeas statute: "An application for a writ shall not be *granted* unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."[171] But that is a significant difference from the PLRA, which provides: "No action shall be brought . . . " before exhaustion of administrative remedies. The habeas statute precludes granting a writ before exhaustion, whereas the PLRA does not contemplate any stay and abeyance, since it requires exhaustion prior to filing a complaint. Further the prior weaker version of exhaustion in § 1997(d) contained a stay provision that Congress purposely deleted from the current PLRA. Thus, the *Rhines* decision is distinguishable.

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[169] *Duncan,* 533 US at 191 (Breyer, J dissenting).
[170] *Rhines v Weber*, 544 US 269 (2005).
[171] *Rhines*, at 276.

CONCLUSION

The judgments of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted

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Dated: September 13, 2006

RESPONDENTS' APPENDIX

Michigan Department of Corrections Policy
Directive, PD 03.02.130
(effective 12/19/2003).....,1b

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE: 12/19/2003	NUMBER 03.02.130
SUBJECT PRISONER/PAROLEE GRIEVANCES	SUPERSEDES 03.02.130 (04/28/03)	
	AUTHORITY MCL 791.203	
	ACA STANDARDS 4-4016; 4-4180; 4-4284; 4-4344	
	PAGE 1 OF 7	

POLICY STATEMENT:

Prisoners and parolees shall be provided with an effective method of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement.

POLICY:

DEFINITIONS

A. Respondent: The staff person who investigates and responds to a grievance.

GENERAL INFORMATION

B. For purposes of this policy, "Warden" includes the Administrator of the Special Alternative Incarceration Program (SAI) facility, unless otherwise specified.

C. The grievance process shall be equally available to all prisoners housed in Correctional Facilities Administration (CFA) and Field Operations Administration (FOA) facilities and all parolees, unless placed on modified access pursuant to this policy. Prisoners at the Michigan Youth Correctional

Facility shall utilize the grievance process as set forth in PD 05.01.145 "Michigan Youth Correctional Facility". Probationers are not covered by this policy but may resolve specific problems and complaints with supervising staff and, if not resolved, with the sentencing court or, if in SAI, as set forth in PD 06.04.105 "Special Alternative Incarceration Program".

D. Grievances filed by female prisoners regarding allegations of sexual misconduct or other conduct in violation of PD 03.03.140 "Prohibited Conduct in Facilities Housing Female Prisoners" shall be investigated and processed by staff in accordance with PD 03.03.140 where in conflict with this policy. However, complaints made pursuant to PD 03.03.140 shall serve to exhaust a prisoner's administrative remedies only when filed as a grievance in compliance with this policy directive.

E. Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant. This includes alleged violations of this policy and related procedures. A grievant may not grieve the content of policy or procedure; such grievances shall be rejected by the grievance coordinator. If a CFA prisoner has a concern with the content of a policy or procedure, s/he may direct comments to the Warden's Forum as provided in PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's

Forum". A copy of all Warden's Forum minutes shall be sent to the Prisoner Affairs Section in the Office of Audit, Internal Affairs and Litigation (OAIAL) for review of all issues relevant to policy and procedure and the prisoner grievance process.

F. Two or more prisoners and/or parolees may not jointly file a single grievance regarding an issue of mutual impact or submit identical individual grievances regarding a given issue as an organized protest. Such grievances shall be rejected by the grievance coordinator. Grievances that raise the following non-grievable issues also shall be rejected by the Grievance Coordinator:

1. Decisions made in hearings conducted by hearing officers of the Hearings and Appeals Division of the Office of Policy and Hearings (OPH) and decisions made in minor misconduct hearings.

2. Decisions made by the Parole Board and recommendations made by its hearing officers to grant, deny, rescind, amend or revoke parole, or not to proceed with a lifer interview or a public hearing.

3. Issues not within the authority of the Department to resolve:

G. Prisoners and parolees are required to file grievances in a responsible manner. A

grievance shall be rejected by the Grievance Coordinator if it contains profanity, threats of physical harm, or language which demeans the character, race, ethnicity, physical appearance, gender, religion or national origin of any person, unless it is part of the description of the grieved behavior and is essential to that description. A grievance also may be rejected for any of the following reasons:

1. It is vague, illegible, contains multiple unrelated issues, or raises issues that are duplicative of those raised in another grievance filed by the grievant.

2. The grievant is on modified access pursuant to Paragraph JJ through NN and has filed a grievance in violation of those paragraphs.

3. The grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control.

4. The grievance is filed in an untimely manner. The grievance shall not be rejected if there is a valid reason for the delay; e.g., transfer.

H. In CFA, grievances shall not be rejected or denied solely because the prisoner has not included with his/her grievance exhibits or other documents related to the grievance. If the grievance references documents and those

documents are not in the prisoner's files or otherwise available to the grievance coordinator or respondent except through the prisoner, the documents shall be reviewed with the prisoner as part of the grievance investigation process. If the grievance coordinator or respondent determines that a copy of a document is needed for the grievance investigation, the copy shall be made at Department expense.

I. A grievant whose grievance is rejected may appeal the rejection to the next step as set forth in this policy. A new grievance shall not be filed regarding the rejection.

J. Grievances shall not be placed in Counselor files, Record Office files, field files or Central Office files, nor shall they be referenced on any document placed in these files except as necessary pursuant to Paragraph L. Grievance documents and files shall be accessed only to investigate or respond to a pending grievance, to respond to a request under the Freedom of Information Act, to respond to a request from the Department of Attorney General or appropriate Central Office staff, or for audits or statistical reporting.

K. A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process or for assisting other grievants in its use. If a grievant believes s/he has been

subjected to acts of reprisal, s/he may file a grievance.

L. If a grievant intentionally files a grievance which is investigated and determined to be unfounded which, if proven true, may have caused an employee or a prisoner to be disciplined or an employee to receive corrective action, the grievant may be placed on modified access consistent with Paragraphs JJ through NN. In addition, if the grievant is a prisoner, s/he may be issued a misconduct report if approved by the Warden or FOA Area Manager; however, major misconduct for Interference with the Administration of Rules shall be issued only if approved by the Warden or FOA Area Manager after consultation with the appropriate Deputy Director or designee. The misconduct report shall be processed as set forth in PD 03.03.105 "Prisoner Discipline".

M. Wardens and FOA Area Managers shall ensure a prisoners and parolees are provided assistance in completing a grievance form, if needed. In such cases, assistance shall be provided by a staff member who is not involved in the grievance.

HURON VALLEY CENTER

N. Grievances filed by a prisoner at the Huron Valley Center (HVC) involving the prisoner's incarceration (e.g., time computation, disciplinary credits, good time, access to law books from the Huron Valley Correctional

Facility) shall be forwarded to the Grievance Coordinator at the Huron Valley Correctional Facility for processing and response.

O. Grievances filed by a prisoner at HVC relating to the prisoner's treatment and living conditions (e.g., quality of the food, room temperatures, not receiving hygiene items, complaints regarding staff, visitor restrictions that are incorrectly imposed) will be responded to by the Department of Community Health (DCH), using the patient grievance process developed by DCH. Grievances answered at the Step III level by the Director of the Bureau of Forensic Mental Health Services shall be forwarded to the Prisoner Affairs Section for record keeping.

GRIEVANCE COORDINATORS

P. In the SAI facility and in each CFA institution, the Warden shall designate at least one staff member to serve as the Step I Grievance Coordinator and at least one staff member to serve as the Step II Grievance Coordinator. The FOA Deputy Director shall designate staff members to serve as Step I Grievance Coordinators and Step II Grievance Coordinators for each FOA field office, corrections center and Technical Rule Violation Center (TRV). Step III grievances shall be processed by the Prisoner Affairs Section.

Q. Each Step I Grievance Coordinator shall prepare and submit monthly reports on

grievances filed in his/her respective facility or office to the Prisoner Affairs Section, as directed by the Manager of the Prisoner Affairs Section. The monthly report shall include information on the subject matter of each grievance filed and, for rejected grievances, the basis for the rejection.

GRIEVANCE PROCESS

R. In an effort to resolve grievable issues as soon as possible, prior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control. If the complaint is not resolved, the grievant may file a Step I grievance. A Step I grievance also may be filed in accordance with OP 03.02.130-A "State Administrative Board Prisoner Property Reimbursement" if the grievance is seeking reimbursement for property lost or destroyed while in the Department's sole possession. If the grievant is dissatisfied with the Step I response, or does not receive a timely response, s/he may appeal to Step II. If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III.

S. A grievant may file a grievance alleging racial or ethnic discrimination or staff brutality or corruption directly to Step III. A grievant also may file a grievance directly to Step III regarding his/her removal as a housing unit

representative by the Warden or CFA Deputy Director pursuant to PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's Forum". In such cases, the Step III grievance must be sent to the Prisoner Affairs Section within the time frame set forth in Paragraph X for filing Step I grievances. Upon receipt, the grievance shall be carefully reviewed to determine whether to respond directly to the grievance, request an investigation into the issue raised in the grievance, or return it to the grievant for filing at Step I.

T. A grievant shall use the Prisoner/Parolee Grievance form (CSJ-247A) to file a Step I grievance and to file a grievance directly with the Prisoner Affairs Section pursuant to Paragraph S; the Prisoner/Parolee Grievance Appeal form (CSJ-247B) shall be used to file a Step II or Step III grievance. The forms may be completed by hand or by typewriter however, handwriting must be legible. The issues shall be stated briefly. Information provided shall be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places and names of all those involved in the issue being grieved are to be included. Information shall be confined to the form and shall not be written on the back, sides or margins of the form, or in the response area. Additional pages may be attached to the grievance form if necessary to provide required information; however, grievants are encouraged to limit the information to the grievance form. If additional pages are necessary, the grievant

shall submit four copies of each additional page; grievance forms shall not be used for this purpose. Prisoners in a CFA institution may use an interdepartment mail run, if available, to send a grievance to another facility. If an interdepartment mail run is not available and the prisoner does not have sufficient funds to mail the grievance, postage shall be loaned as set forth in PD 05.03.118 "Prisoner Mail".

U. Time limitations shall be adhered to by the grievant and staff in all steps of the grievance process. Grievances and grievance appeals at all steps shall be considered filed on the date sent by the grievant. The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension has been approved in writing by the Grievance Coordinator or the Prisoner Affairs Section at one of the steps in the grievance process. An extension shall not exceed 15 business days. The Grievance Coordinator or, at Step III, the Prisoner Affairs Section shall immediately notify the grievant in writing whenever an extension has been approved; the extension also shall be noted in the grievance response.

V. If a grievant chooses to pursue a grievance which has not been responded to by staff within required time frames, including any extensions granted, the grievant may forward the grievance to the next step of the grievance process within ten business days after the

response deadline expired, including any extensions which have been granted.

W. Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, review or response, except as necessary to provide information to the respondent.

Step I

X. Within five business days after attempting to resolve a grievable issue with staff, a grievant may send a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility, field office or other office being grieved. If the office being grieved does not have a designated Grievance Coordinator, the grievant shall send the grievance to the Step I Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

Y. The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those which may be rejected. Where available, the Grievance Coordinator shall use a computerized grievance tracking system for this purpose. The Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy and, if so, sign and return the grievance to the grievant with an explanation as to why it was rejected. In CFA, if the grievance is being rejected because it

presents a non-grievable issue, the Grievance Coordinator's supervisor shall review the reason for the rejection to ensure it is in accordance with policy; both the Grievance Coordinator and the supervisor are required to sign the grievance before returning the grievance to the grievant. If the grievance is accepted, the Grievance Coordinator shall assign an appropriate respondent and identify the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted pursuant to Paragraph U. If the issue is of an emergent nature, the Grievance Coordinator may order a Step I response within two business days. The Grievance Coordinator may respond at Step I to grievances which require only minimal investigation or rejected for reasons authorized by this policy. However, if the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted as required in Paragraph AA.

Z. The respondent assigned pursuant to Paragraph Y shall generally be the supervisor of the person being grieved. The OPH Administrator shall designate a respondent for grievances involving OPH hearing officers and hearings conducted by OPH. The respondent for grievances involving the Parole Board shall be designated by the Parole Board Chairperson.

AA. The respondent shall interview the grievant unless s/he refuses to participate in the

interview, the respondent is not assigned to the location at which the grievant is confined, or, if the grievant is on parole in the community, the respondent does not have ready access to the field office to which the grievant is assigned. If the grievant is not interviewed, the reason shall be included in the written response to the grievance. The grievant shall have the opportunity to explain the grievance more completely at the interview, enabling the Step I respondent to gather any additional information needed to respond to the grievance. The interview also provides the opportunity to resolve the grievance to the mutual satisfaction of the grievant and the Department.

BB. The respondent shall identify in the response the policies, rules or procedures that are directly related to the issue or conduct being grieved. Each Step I grievance response shall be reviewed by the respondent's supervisor prior to the grievance being returned to the Step I Grievance Coordinator to ensure that it appropriately addresses the issue raised in the grievance and accurately reflects Department policy and procedure. Where there is limited staffing in an FOA field office, corrections center or TRV, the requirement for supervisory review of a Step I response shall not apply if the response is prepared by an FOA supervisor/manager.

CC. The Step I Grievance Coordinator shall ensure that a thorough investigation was completed

for each Step I grievance accepted, that the response was reviewed by the appropriate supervisor and that a copy of the response is provided to the grievant by the due date, including any extension granted.

Step II

DD. If a grievant is dissatisfied with the response received at Step I or does not receive a timely response, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response or, if no response was received, within five business days after the date the response was due, including any extensions. The grievant must send the completed form CSJ-247B to the Step II Grievance Coordinator designated for the facility, field office or other office being grieved within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator. If the office being grieved does not have a designated Grievance Coordinator, the grievant is to send the grievance to the Step II Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

EE. The Grievance Coordinator shall log each Step II grievance received, including those which may be rejected. Where available, the Grievance Coordinator shall use a computerized grievance tracking system to do so. The Grievance Coordinator shall

determine if the grievance should be rejected pursuant to this policy and, if so, return the grievance to the grievant with an explanation as to why it was rejected. If accepted, the Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted as set forth in Paragraph U.

FF. The respondents for Step II grievances shall be as follows:

1. The Warden in CFA and SAI facilities, except that s/he may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised. If the Warden supervises a camp, s/he may delegate this responsibility for camp grievances to the Assistant Deputy Warden at the camp.

2. The appropriate Area Manager for FOA area offices, corrections centers and TRVs.

3. The Regional Health Administrator or designee in grievances alleging inadequate medical care.

4. The Administrator of Michigan State Industries or designee for grievances involving that Bureau.

5. The OPH Administrator for grievances involving that Office.

6. The Parole Board Chairperson for grievances involving the Parole Board.

7. The Administrator of the Office of Field Programs for grievances involving that office.

8. The CFA Region III Business Manager for grievances involving administrative support functions for CFA facilities in Jackson.

GG. The Grievance Coordinator shall ensure that any additional investigation was completed as necessary for each Step II grievance accepted and that a copy of the response is provided to the grievant by the due date, including any extensions granted pursuant to Paragraph U.

Step III

HH. If a grievant is dissatisfied with the response received at Step II or does not receive a timely response, s/he may send a completed Step III grievance to the Prisoner Affairs Section. The form must be sent within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due, including any extensions. A grievant also may file a grievance directly to Step III in accordance with Paragraph S.

II. The Prisoner Affairs Section shall be the respondent for Step III grievances on behalf of the Director. Each grievance received at Step III, including those which may be rejected, shall be logged on a computerized grievance tracking system. The tracking system shall include information on the subject matter of each grievance received and, for rejected grievances, the basis for the rejection. The Prisoner Affairs Section shall forward grievances regarding medical care or treatment filed against health care staff, including contractual staff, to the Administrator of the Bureau of Health Care Services (BHCS). The BHCS Administrator shall ensure the grievance is investigated and a response provided to the Prisoner Affairs Section in a timely manner. The Manager of the Prisoner Affairs Section shall ensure that any additional investigation is completed as necessary for each Step III grievance accepted and that a copy of the Step III response is provided to the grievant by the due date, including any extensions granted pursuant to Paragraph U.

MODIFIED ACCESS

JJ. A prisoner or parolee who files an excessive number of grievances which are frivolous, vague, duplicative, raise non-grievable issues, or contain prohibited language as set forth in Paragraph G, or is found guilty of misconduct for filing an unfounded grievance as set forth in Paragraph L, may have access to the grievance process limited by the Warden or FOA Area Manager for an initial period of not

more than 90 calendar days. If the prisoner or parolee continues to file such grievances while on modified access, the Warden or FOA Area Manager may extend the prisoner's or parolee's modified access status for not more than an additional 30 calendar days for each violation. In CFA, a recommendation to place a prisoner on modified access shall be submitted only by the Grievance Coordinator, with approval of his/her supervisor, and shall include a list of the grievances forming the basis for the recommendation and the reason for the recommendation; both the Grievance Coordinator and supervisor shall sign the recommendation.

KK. The Warden or FOA Area Manager, as appropriate, shall ensure that a prisoner or parolee placed on modified access, or who has had that status extended, is immediately notified in writing of this determination. The Warden or FOA Area Manager also shall immediately notify the Prisoner Affairs Section in writing whenever s/he places a prisoner or parolee on modified access or extends that status.

LL. The Manager of the Prisoner Affairs Section also may place a prisoner or parolee on modified access, or extend that status, for the reasons set forth in Paragraph JJ. The Manager of the Prisoner Affairs Section shall ensure that each prisoner or parolee placed on modified access or who has that status extended is immediately notified in writing of that determination. The Manager of the

Prisoner Affairs Section also shall ensure that the appropriate Warden or FOA Area Manager is notified in writing of the determination.

MM. While on modified access, the prisoner or parolee shall be able to obtain grievance forms only through the Step I Grievance Coordinator. A grievance form shall be provided if the Step I Grievance Coordinator determines that the issue the prisoner or parolee wishes to grieve is grievable and otherwise meets the criteria outlined in this policy. The Grievance Coordinator shall maintain a record of requests received for grievance forms and whether the request was approved or denied and, if denied, the reason for the denial. If a prisoner or parolee on modified access attempts to file a grievance using a form not provided by the Grievance Coordinator, the prisoner or parolee shall be notified that the grievance will not be processed. The Warden, FOA Area Manager or Manager of the Prisoner Affairs Section may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation. Notification of such extensions shall be consistent with the requirements set forth in Paragraphs KK and LL.

NN. A prisoner or parolee shall remain on modified access for the approved period even if transferred to another facility or field location. The Grievance Coordinator for the sending facility or field location shall ensure that the Grievance Coordinator for the receiving

facility or field location is notified of this information.

OPERATING PROCEDURE

OO. The OAIAL Administrator shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive no later than December 19, 2003. This requirement includes ensuring that their existing procedures are revised or rescinded, as appropriate, if inconsistent with policy requirements or no longer needed.

AUDIT ELEMENTS

PP. A Primary Audit Elements List has been developed and will be provided to Wardens, the SAI facility Administrator, FOA Regional Administrators and the OAIAL Administrator to assist with self audit of this policy, pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

PLC/OPH/12-08-03